

STAFF REQUEST FOR PERMISSION TO PROCEED WITH  
FORMAL REGULATORY PROCESS FOR THE FOLLOWING ACTIONS:

ADD NEW REGULATION SECTION 18662-0;  
REVISE EXISTING REGULATION SECTIONS 18662-1 THROUGH 18662-6;  
REPEAL REGULATION SECTION 18662-7 AND RESERVE SECTION FOR FUTURE USE;  
REPEAL EXISTING REGULATION SECTIONS 18662-11 THROUGH 18662-14;  
(WITHHOLDING AT SOURCE); AND  
REVISE AND RENUMBER REGULATION SECTION 25401b  
TO REGULATION SECTION 19002  
(CREDIT FOR TAX WITHHELD)

Withholding at source is an essential part of the Franchise Tax Board's (FTB) Tax Gap Compliance Initiative. The ultimate goal of withholding is to facilitate fair and efficient tax compliance and administration by requiring payers to remit a portion of payments due to payees directly to FTB to pay amounts approximating the tax due with respect to the income from the payment. Thus, withholding at source benefits the state by reducing the risk that the income and resulting tax will not be reported and paid, and encouraging the filing of returns to report taxable income and claim credit for the withheld amounts.

#### The Existing Regulations

California law requires FTB to issue regulations to implement the withholding at source statutory requirements. (Revenue and Taxation Code section 18662, subdivision (a).) While withholding regulations remain in effect (California Code of Regulations, Title 18, Regulation sections 18662-1 through 18662-14), these regulations have not been updated in over 20 years.

Many new withholding laws and legislative amendments have been adopted in the last 20 years. Statutory changes such as real estate withholding, alternative withholding method, sourcing of income, and the use of different types of business entities, are without regulatory guidance in the existing regulations. The existing regulations were also written at a time when electronic filing and electronic payment options were not available. As such, the existing regulations are not aligned with FTB's new Withholding At Source System (WASS), a four-year technology modernization project designed to provide increased operational efficiencies, reliability, scalability, and security in support of FTB's mission critical withholding programs.

The existing regulations are also not organized in a useful framework. Regulatory action is necessary because the current FTB withholding regulations are not well-suited to piecemeal amendment but instead require a complete reorganization and restructuring.

#### The Proposed Regulations

Staff is proposing new regulations that conform to current law and existing FTB procedures. The proposed withholding regulations are being promulgated to create a comprehensive set of procedural regulations that cover FTB's current withholding processes, excepting those processes specifically identified as not included in the regulations. For example, the proposed regulations contain a Table of Contents, definitions, and general rules applicable to all withholding at source. The proposed regulations then provide guidance for various withholding areas, different types of California source income, reporting and remitting obligations, penalties, and rules for crediting the tax withheld amounts. The proposed regulations are intended to provide additional clarity and transparency for taxpayers, tax practitioners, withholding agents, and the public.

## Background

On June 27, 2007, FTB received approval from the three-member Franchise Tax Board to proceed with the first interested parties meeting on the proposed amendments to the withholding regulations. FTB included the first draft of the proposed regulations in the Board materials. Staff explained that it was necessary to begin to revise and update the withholding regulations and to bring them into conformity with then-current law and current FTB practice, in anticipation of the WASS modernization system to be implemented over the next four years.

The first interested parties meeting was held on August 13, 2007. The following documents were provided to the public in advance of the meeting: a topic list, an outline of the history of California withholding, the first draft of the proposed regulations, and draft forms and instructions for 2008. Staff also invited questions and comments on the draft regulations.

For the Board meeting of November 28, 2007, staff requested permission to proceed with the formal regulatory process, which was granted. The following materials were provided in advance of the meeting: a report of the first interested parties meeting; staff responses to comments received from the public; and the second draft of the proposed regulations showing revisions made as a result of the interested parties meeting.

During 2008 through 2009, the Legislature enacted a number of new laws, which substantially changed the withholding requirements. Some of these laws related to real estate installment sales (Stats. 2008, ch. 305), real estate withholding (Stats. 2008, ch. 305), the maximum withholding rate (Stats. 2008 3rd Ex. Sess, ch.18), and backup withholding (Stats. 2009 4th Ex.Sess, ch. 18). As a result of these new laws, staff prepared a third draft of the proposed regulations.

On July 14, 2011, FTB held the second interested parties meeting to solicit input on the third draft of the proposed regulations. Several documents were provided to the public in advance of the meeting: discussion topics; an overview of the purpose and scope of the regulations; revisions since 2007; a cross-reference chart of proposed regulations to existing regulations; and the third draft of the proposed regulations.

Staff discussed that, as part of the third draft of the proposed regulations, it planned to repeal the existing Regulation section 18662-7 and reserve this section for a future interested parties meeting relating to domestic (U.S.) pass-through entities as a separate regulatory action. Staff received comments and encouraged the submission of additional comments for an additional month, through August 12, 2011.

A report of the second interested parties meeting is attached. The report includes a detailed response to the comments received and revisions implemented by staff as a result of the comments.

Staff has prepared a fourth draft of the proposed regulations, which includes revisions since the second interested parties meeting of July 14, 2011. A [track-change version of revisions](#) since the July 14, 2011 interested parties meeting can be found at [www.ftb.ca.gov](http://www.ftb.ca.gov). The proposed regulations are consistent with existing law, FTB procedures, and the department's new WASS system.

Based on the foregoing, staff now requests permission to begin the formal regulatory process to adopt the above regulatory actions.

Report on Second Interested Parties Meeting  
Proposed Regulations Relating to  
Revenue and Taxation Code Sections 18662 (Withholding at Source)  
and 19002 (Credit for Tax Withheld)

Administration

A second interested parties meeting was held on July 14, 2011, at 1:00 p.m. at the Franchise Tax Board (FTB) Central Office in Sacramento. Representing the department were Bruce R. Langston and Kenneth A. Davis of the Legal Division.

Staff Commentary

FTB held the second interested parties meeting to solicit input on the third draft of the proposed regulations. Several documents were provided to the public in advance of the meeting: discussion topics; an overview of the purpose and scope of the regulations; revisions since 2007; a cross-reference chart of proposed regulations to existing regulations; and the third draft of the proposed regulations.

Mr. Langston first discussed that numerous revisions had been made since the second draft of proposed regulations, which was a result of many of the new laws adopted in 2008 and 2009. He commented that changes were also made as a result of new procedures being implemented with FTB's Withhold at Source System (WASS). He explained the new WASS system would automate processing of payments and billing and interface with FTB's accounting systems and the new Enterprise to Data (EDR) system. This would allow FTB to provide withholding credit information to taxpayers online and allow for better reconciliation of claimed withholding to paid withholding.

Mr. Langston then explained that Regulation section 18662-7 would be reserved for a future interested parties meeting relating to domestic (U.S.) pass-through entities. Mr. Davis added that staff also planned to reserve certain definitions in Regulation section 18662-2, such as "owner of pass-through entities" and "pass-through entities" for the future interested parties meeting on that topic.

Mr. Davis then described each section of the proposed regulations and requested comments. At the meeting, staff received comments and encouraged the submission of comments for an additional month, through August 12, 2011.

Attendee Commentary and Post-Meeting Commentary

The attached chart organizes the comments by regulatory section and indicates staff's consideration and action on each suggestion. Staff also reviewed the draft language and made additional technical changes, which are also indicated in the chart.

Subsequent Action

Staff has prepared a fourth draft of proposed regulations, which includes revisions since the second interested parties meeting of July 14, 2011.

December 1, 2011

**Suggested Revisions and Comments from Second IPM of July 14, 2011**  
**Regulation Sections 18662-0 through 18662-8 and 19002**

<b>Proposed Regulation</b>	<b>Subject Matter</b>	<b>Suggested Revision (And Source)</b>	<b>Staff Response<sup>1</sup></b>
<b>18662-0</b>	<b>Table of Contents</b>	1) The title at 18662-3(d) does not include (1) ~ (3); 18662-5(c) does not include (1) ~ (4); 18662-5(e) does not include (1) ~ (2); and 18662-6(c) does not include (1) ~ (6). (IP) <sup>2</sup>	1) Revisions accepted.
		2) The title of 18662-3(g)(4) listed is not the same as in the actual 18662-3(g)(4). The same is true for 18662-5, 18662-5(h)(3), and 18662-5(h)(4). (IP)	2) Revisions accepted.
<b>18662-1</b>	<b>Withholding Generally</b>	1) At (a)(1), delete language “from certain payments and payment of those withheld amounts to California” for clarity. (FTB)	1) Staff revision for clarity.
		2) At (a)(1)(C) withholding is required on the allocable amounts of effectively connected income attributable to CA and not on “amounts paid.” (IP)	2) Revision accepted. Staff revised the language by deleting the phrase, “amounts paid,” in two places plus the phrase, “have income.”
		3) At (a)(1)(C), since foreign (non-U.S.) partners and members are covered by R&TC 18666 and excluded from the Regulation 18662 provisions, provide an example stating that payments of non-effectively connected income attributable to CA are not covered by either R&TC 18662 or R&TC 18666. (IP)	3) Revision partially accepted. Staff clarified the language by deleting a phrase, which now reads, “These regulations do not cover withholding on foreign (non-US) partners and members. (See Treasury Regulation section 1.1446-) et seq. and Internal Revenue Service (IRS) publications.” Given this clarifying revision, staff believes that an example is not necessary.
		4) At (b)(3), title revised. (FTB)	4) Staff revision.
		5) At (b)(3)(A), delete phrases “from payments” and “for certain payments.” (FTB)	5) Staff revision for clarity.
		6) At (b)(3)(B), delete the word, “general.” (FTB)	6) Staff revision for clarity.

<sup>1</sup> Please note that where staff accepted a proposed revision, staff did not always use the exact language proposed by the interested party. In some cases, the revision was accepted in principle, but staff modified the language to better fit the context and goals of the regulations.

<sup>2</sup> For each suggested revision, staff has indicated whether the source is an interested party (IP) or FTB staff (FTB).

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<b>18662-2</b>	<b>Definitions</b>	1) At (b), definition of “buyer” should be revised as it seems to imply the inclusion of “real estate escrow person.” (IP)	1) Revision not accepted. Staff believes the definition is accurate and is not inclusive of the term, “real estate escrow person.” The term “real estate escrow person” has its own definition under (u) and under R&TC 18662(e)(6)
		2) At (c), definition of "California real property interest" appears to enhance the statutory definition set forth in R&TC 18662 (e)(5). Also, clarify option language. (IP)	2) Revision accepted. Conflicting language in definition deleted to conform to R&TC 18662 (e)(5). Also, last sentence revised to state, “[A]n ownership interest does not include an option to acquire real estate, unless the option is exercised and the property transferred.”
		3) At (h), the definition of “items of income” appears confusing, as it includes “all payments or receipts.” Reg 18662-1 (a)(1) and (b)(3) refer to the requirement to withhold tax at source on payments. Commenter suggests that the term “receipt” be explained via an example. (IP)	3) Revision partially accepted. The phrase “all payments or receipts” appears confusing and is deleted. Given this clarifying revision, staff believes that an example is not necessary.
		4) At (h), the items of income listed are not exactly the same as provided in R&TC 18662(b). Is there a distinction? (IP)	4) Revision accepted. The terms “interest,” “dividends,” and “partnership income or gains” have been inserted, consistent with 18662 (b).
		5) At new (k), the definition of “Nonresident alien” is inserted. (FTB)	5) Staff revision.
		6) At (l), the term “[Reserved]” should be inserted after the term, “Owner of a Pass-Through Entity.” The language included in the definition is deleted. The definition will be the subject of a future interested parties meeting, along with section 18662-7. (FTB)	6) Staff revision discussed at interested parties meeting of July 14, 2011.
		7) At (o), definition of “pass-through entity,” the commenter explains in detail why a closely-held REIT, a CFC, a FPHC, and a PFIC should not be included in the definition and additional issues relating to the character and sourcing of the income. (IP)	7) At the interested parties meeting of July 14, 2011, staff stated that the definition of “pass-through entity” would be deleted and reserved for discussion at a future interested parties meeting relating to pass-through entities and section 18662-7.

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		8) At (u), definition of “seller” should be revised as it seems to imply the inclusion of “real estate escrow person.” (IP)	8) Revision not accepted. Staff believes the definition is accurate and is not inclusive of the term “real estate escrow person.” The term, “real estate escrow person,” has its own definition under (u) and under R&TC 18662(e)(6). Also, the term “real estate escrow person” has been deleted from (v), “transferee,” and (w) “transferor,” which should resolve any ambiguity.
		9) At (v), definition of “Transferee,” remove the terms “real estate escrow person” and “title company” from the definition. (IP)	9) Revision accepted.
		10) At (w), definition of “Transferor,” remove the terms “real estate escrow person” and “title company” from the definition. (IP)	10) Revision accepted.
<b>18662-3</b>	<b>Real Estate Withholding</b>	1) At (d) (1), (2), and (3) the title needs to tie back to the Table of Contents. (IP)	1) Revision accepted.
		2) At (d) (1) (A) the parenthetical language is fragmented and incomplete. (IP)	2) Revision accepted. Language revised to state: “No withholding is required for a corporation or partnership incorporated or qualified to do business in California or where the entity continues to have a permanent place of business and maintains a permanent staff within California after the sale. Where the seller is a disregarded entity for tax purposes, no withholding is required if the owner of the disregarded entity is incorporated or qualified to do business in California or continues to have a permanent place of business and maintains a permanent staff within California after the sale.”
		3) What is the distinction between a corporation at (d)(1)(A) and (d)(2)(E), or a partnership at (d)(1)(A) and (d)(2)(G)? (IP)	3) Staff states that one subsection identifies the specific exemptions; the other subsection identifies the process used to establish the exemptions.
		4) At (d)(1)(D), insert, “(4) At a sale pursuant to one or more short sale agreements with seller/transferor’s short sale lender(s).” Suggested procedural change for new short sale transactions under SB 458. (IP)	4) Revision not accepted. Staff believes that the Legislature would have statutorily created a new exemption for short sale transactions, but it did not do so. Staff also believes that, if appropriate, using the exemption certificates would accomplish the same purpose. See also, Regulation 18662-3 (g)(7) (Short Sale

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			Transactions).
		5) At (d)(2)(i), should the definition of insurer include the Ceridian fix language "whether or not the insurer is engaged in business in California" as found in R&TC 24410(a)? (IP)	5) Issue addressed by the following revised language: "No withholding is required if the seller certifies that it is an insurer within the meaning of Section 28 of Article XIII of the California Constitution that pays the California gross premiums tax."
		6) At (d)(3)(A), should items 1 and 3 include the same "in excess of \$1,500" language mentioned in item 2, or should all three items refer to an amount in excess of the de minimis threshold defined in Reg 18662-4(a)(2)? (IP)	6) Revision accepted for (d) (3)(A) (1). Revision not accepted for (d)(3)(A)(3). Withholding is required on the total sales price of the failed exchanged, unless the alternative method is used.
		7) At (d)(3)(A), delete the word "any" before the word "proceeds." (FTB)	7) Staff revision.
		8) At (d)(3)(B) (Installment Sales), provide for an option to withhold in full by the seller at closing. (IP)	8) Revision not accepted. There is no statutory authority to allow for full withholding by a seller at closing where there is an installment sale.
		9) At (f)(2), clarify that the requirement to retain the exemption certificate for five years only applies to that certificate and not the estimated gain or loss certificate. (IP)	9) Revision accepted. The word "exemption" has been included in the first sentence for clarity. The title has been revised. The phrase, "Whether or not a certificate is required to be filed with the Franchise Tax Board," and the word, "form" are deleted.
		10) At (f)(3), Example 3, what would be the result if title of the property was held by a disregarded entity wholly owned by the partnership? (IP)	10) Revision not accepted. In the suggested example, if title to the property was held by an LLC that is wholly owned by a partnership, the real estate escrow person would only allow the person holding recorded title to sign the certificate.
		11) At (g)(2), Example 2, change the spelling of "Sellers" to show multiple sellers involved. (IP)	11) Revision accepted.
		12) At (g)(5), there is a discrepancy with Reg 18662-2(c). The former says that the sale of an option to buy real property is considered a sale of a real property interest; the latter says that an ownership interest does not include any option to acquire real estate. (IP)	12) Revision accepted. The language has been revised to state, "Withholding is required on an option to buy real property that has been exercised and the property transferred by the owner."

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<b>18662-4</b>	<b>Withholding on Payments (Nonresident Withholding) - General</b>	1) At (a), clarify that the section is not intended to impose new duties on the real estate escrow person acting in that capacity. (IP)	1) Revision not accepted. Staff believes that the regulatory language is sufficient and does not impose greater duties on the real estate escrow person acting in that capacity. However, if the escrow or title company acts in other capacities, the withholding rules apply.
		2) At (b)(3), withholding on payments of unrelated business income to tax exempt organizations is a policy change. (IP)	2) Revision accepted. The phrase, "except for payments of unrelated business income," is deleted.
		3) At (b)(13), should the reference also be to R&TC 23040.1? (IP)	3) Revision accepted.
<b>18662-5</b>	<b>Other Types of Payments and Withholding Obligations</b>	1) At (a), clarify that the section is not intended to impose new duties on the real estate escrow person acting in that capacity. (IP)	1) Revision not accepted. Staff believes that the regulatory language is sufficient and does not impose greater duties on the real estate escrow person acting in that capacity. However, if the escrow or title company acts in other capacities, the withholding rules apply.
		2) The title should agree to the Table of Contents. (IP)	2) Revision accepted.
		3) At (a)(2)(L) there should be a period at the end of the sentence. (IP)	3) Revision accepted.
		4) At (a) (4) the term "nonresident alien" is used. Should the term be defined at Regulation 18662-2? (IP)	4) Revision accepted. A definition is included at Regulation 18662-2. The title and the language are also revised to state "nonresident aliens or foreign entities." The phrase, "are required to report income . . . Return," is deleted.
		5) After (d)(1), add two subsections where withholding would not apply: 1) an employee of a nonresident property owner who collects rent payments on behalf of the nonresident owner; and 2) an individual, whether or not a family member, who collects rent payments on behalf of the nonresident property owner, but receives no compensation from the nonresident owner. (IP)	5) Revisions accepted and additional language included at (d)(1)(B)(2) and (d)(1)(B)(3).
		6) At (d)(1), modify the definition of property manager as one who is a licensed realtor or property manager, or who is in the trade or business. (IP)	6) Revision not accepted. FTB defines a withholding agent as any person or entity with the control, receipt, custody, disposal, or payment of California source income. Any person who meets the definition of a withholding agent is required to remit any tax withheld and to complete the information returns prescribed under forms and



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			<p>instructions by the Franchise Tax Board. The term "withholding agent" also means the person charged by the law or by the Franchise Tax Board's order or regulation with the duty to withhold any tax, interest, or penalties from payments to the taxpayer and to remit such amounts over to the Franchise Tax Board. Whether or not the individual or entity is licensed as a realtor or property manager, the individual or entity meets the definition of a withholding agent and therefore is required to withhold on the California source income they are collecting and sending to the nonresident property owner.</p>
		<p>7) At (d)(1), add a subsection that withholding would not apply to an individual whose only compensation for managing the property is reduced or free rent. (IP)</p>	<p>7) Revisions not accepted. Staff believes that the suggestion relating to "reduced or free rent" will have additional facts associated in the withholding determination. For example, the individual may be receiving free or reduced rent as an employee of the nonresident owner or as compensation under a contractual independent contractor relationship.</p>

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		8) At (d)(1), allow a property manager to deduct repair and maintenance expenses (as well as their fees) from rent collected, and calculate the withholding based on the remainder to be sent to the nonresident property owner. (IP)	8) Revision not accepted. As part of its review, staff requested feedback from leaders of the property management industry who regularly handle withholding on behalf of nonresident owners. Currently the nonresident property owner is responsible for completing a Form 589 for a reduction in withholding. The property management industry was not in favor of the change for a number of reasons, including the following: 1) Property managers may not have the expense information to substantiate any threshold percentage and may not receive the information timely from the nonresident owner. 2) Property managers may not handle any part of the maintenance. 3) Property managers do not want to open themselves up to more liability and workload. Based on the above, the suggestion was not implemented.  Staff believes that the current process provides protection and documentation for both the property manager and the nonresident owner when determining the proper amount of withholding.
		9) At (h) (3) and (h)(4) the titles should be conformed to the Table of Contents. (IP)	9) Revisions accepted.
		10) At (h) (4), second paragraph, clarify that this discussion is generally regarding California's sales and use tax laws. (IP)	10) Revision accepted.
		11) At (h) (5), change the "previous year's ratio" to the "most recently filed year's ratio" since the prior year's return may not be filed until well into the current year? (IP)	11) Revision accepted.
<b>18662-6</b>	<b>Nonresident Withholding of Entertainers, Athletes, and Speakers</b>	1) At (c ) (1) ~ (c )(6) there should be titles that ties back to the Table of Contents. (IP)	1) Revisions accepted. Titles have been inserted into each of the subsections.
		2) At (c) (5), change sentence to state, "are performed outside of California." (FTB)	2) Staff revision.

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<b>18662-7 (reserved)</b>	<b>Pass-Through Entities (Reserved)</b>	1) Allow pass-through withholding on real estate to be deemed timely performed by the due date of the corporate tax return rather than at the due date of the individual's return (where the individual receives the credit). (IP)	1) This is a pass-through entity issue, which will be discussed at a future interested parties meeting for pass-through entities.
<b>18662-8</b>	<b>Reporting and Remitting Amounts Withheld, Penalties and Interest; Other Procedures</b>	1) At (b)(2)(A), continue to allow for paper reporting and remittance. (IP)	1) Revision is already provided in the proposed regulation. The subsection provides for flexibility in paper reporting and remittances unless the 250 information return threshold is met.
		2) At (b)(2)(B), suggest clarifying that the payee information return for real estate withholding is provided once to the payee, and that an additional information return is not intended by the language. (IP)	2) Revision accepted. Language revised to state, "An information return stating the amount of the real estate withholding shall be provided to the payee either at the time of sale or not later than January 31st of the following calendar year . . ."
.		3) At (d) (1), suggest the following example: A distribution of California source income is made to a nonresident where withholding should have been made by April 15 <sup>th</sup> of the year of distribution. The withholding agent failed to withhold. The nonresident filed a California tax return on October 15 <sup>th</sup> of the year subsequent to the distribution year. Franchise Tax Board shall assess interest against the withholding agent on the amount that should have been withheld from the period April 15 of the distribution year to October 15 of the year subsequent to the distribution year.	3) Revision not accepted. This issue is reserved for a future interested parties meeting relating to pass-through entities, along with section 18662-7.
		4) At (d)(2) (C ), suggest the following example: Same as the Example at (d) (1). Because the nonresident filed a return and paid tax, no tax is due from the nonresident and no penalty can be imposed on the withholding agent (other than interest, information return penalties, EFT, etc.). However, if the nonresident did not file a return and pay tax, the withholding agent is also liable for a penalty in the amount of taxes due from the nonresident on the California source income distributed, but not in excess of the amount required to be withheld.	4) Revision accepted. Instead of an example, staff inserted a statement at (d)(2)(C).
		5) At (d)(2)(D), first sentence revised.	5) Staff revision.

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		6) At (d)(2)(D), clarify that the real estate escrow person is not liable if the real estate escrow person receives the certificates from the seller, but upon request of FTB for copies from the real estate escrow person, FTB discovers that information is incomplete. (IP)	6) Revision not accepted. Staff believes that real estate escrow persons should know what is considered a completed certificate, which is stated at (d)(2)(D). See also, Examples 2 and 3 at Regulation 18662-3 (f) (3).
		7) At (d)(2)(D), also, clarify the last sentence of the paragraph as it relates to the seller knowingly executing a false exemption certificate. (IP)	7) Revision accepted. Language revised to state, "If the seller knowingly executes a false exemption certificate, the seller may be subject to a penalty of the . . ."
<b>19002</b>	<b>Credit for Tax Withheld</b>	1) At (b), what ownership interest is in view [used] for purposes of passing through withholding taxes (profits, loss, capital)? (IP)	1) Revision accepted. Language clarified by deleting "shareholder or partners" and adding "entity's owners."
		2) At (c), can an example be included to clarify the point? (IP)	2) Revision not accepted. This issue is reserved for a future interested parties meeting relating to pass-through entities, along with section 18662-7.

Regulation Section 18662-0 is adopted to read:

§ 18662-0. Table of Contents. – Regulation Sections 18662-1 through 18662-8.

§ 18662-1. Withholding-Generally.

(a) Types of Withholding-Application of Regulations.

(1) Overview.

(b) Withholding of Tax at Source.

(1) General.

(2) Real Estate Withholding.

(3) Withholding by Withholding Agent.

(4) Reporting and Remitting Amounts Withheld.

(5) Credit for Tax Withheld.

(c) Withholding Required After Notification.

§ 18662-2. Definitions.

(a) Buyer.

(b) California Business Entity.

(c) California Real Estate.

(d) California Resident.

(e) California Trust or Estate.

(f) Exempt Organization.

(g) Individual.

(h) Items of Income.

(i) Non-California Business Entity.

(j) Nonresident.

(k) Nonresident Alien.

(l) Nonresident Estate or Trust.

(m) Owner of a Pass-Through Entity.

(n) Partner.

(o) Partnership.

(p) Pass-Through Entity [Reserved].

(q) Payee.

(r) Payer.

(s) Permanent Place of Business.

(t) Person.

(u) Real Estate Escrow Person.

(v) Seller.

(w) Transferee.

(x) Transferor.

(y) Withholding Agent.

### § 18662-3. Real Estate Withholding.

- (a) General.
- (b) Statutory Basis and Rates.
- (c) Who Must Withhold – Required Notification and Responsibility.
  - (1) Notification.
  - (2) Penalties for Failure to Provide Notice.
  - (3) Buyer's Responsibility to Withhold May be Delegated.
- (d) Exemption and Withholding Requirements.
  - (1) Full Exemption.
  - (2) Transfers Requiring an Exemption Certificate to Exempt the Sale From Withholding.
  - (3) Transfers That May Partially or Fully Exempt the Sale from Withholding.
- (e) Withholding on Special Entities.
  - (1) Grantor Trusts.
  - (2) Trusts.
  - (3) Bankruptcy Trusts and Estates.
  - (4) Estates.
  - (5) Conservatorships and Receiverships.
  - (6) Relocation Companies.
- (f) Procedures.
  - (1) Exemption Certificate and Estimated Gain or Loss Certificate.
  - (2) Retention of Withholding Exemption Certificate.
  - (3) Verification.
  - (4) Electing the Alternate Withholding Calculation.
- (g) Special Rules.
  - (1) Multiple Family Units.
  - (2) Multiple Sellers.
  - (3) Sellers on Title for Incidental Purposes.
  - (4) Sale of Multiple Parcels.
  - (5) Leaseholds/Options.
  - (6) Personal Property Included in Real Estate Transaction.
  - (7) Short Sale Transactions.

### § 18662-4. Withholding on Payments (Nonresident Withholding) - General.

- (a) Nonresident Individuals and Non-California Business Entities; De Minimis Amounts; and Rate.
  - (1) Nonresident Individuals and Non-California Business Entities.
  - (2) De Minimis Amounts.
  - (3) Rate.
  - (4) Cross-References.
- (b) Optional Withholding or No Withholding Required.
  - (1) California Residents.
  - (2) California Business Entities.

- (3) Tax Exempt Organizations.
  - (4) California Estates and Trusts.
  - (5) Banks and Banking Associations.
  - (6) Sale of Goods.
  - (7) Services of a Nonresident Outside of California.
  - (8) Intangible Personal Property.
  - (9) Motor Carrier Compensation.
  - (10) Wages Paid to Employees.
  - (11) Nonresident Corporate Directors.
  - (12) Insurance Companies, Individual Retirement Plans, Pension or Profit Sharing Plans.
  - (13) Income from Qualified Investment Securities.
- (c) Withholding Exemption Certificates.
  - (1) General.
  - (2) Incomplete or Invalid Exemption Certificates.
  - (3) California Address.
  - (4) False Certificate.
- (d) Information Returns Also Required.
- (e) Waivers and Reduced Amounts.
  - (1) Waivers.
  - (2) Request for Reduced Withholding Amount.
  - (3) Other Conditions As May Be Required.
- (f) Requirement to File a California Return.
- (g) Suspended and Forfeited Corporations.

§ 18662-5. Other Types of Payments and Withholding Obligations.

- (a) Payments to Nonresidents Subject to Withholding.
  - (1) General.
  - (2) California Source Income Subject to Withholding.
  - (3) Business Situs.
  - (4) Payments to Nonresident Aliens or Foreign Entities.
  - (5) Payments Made to Reimburse Expenses.
  - (6) Services in Connection With the Sale of Goods.
- (b) Payments to Independent Contractors.
- (c) Payments to Nonresident Subcontractors.
  - (1) Withholding Requirements.
  - (2) Payments to California Residents.
  - (3) General Contractor Obligations.
  - (4) Multiple Contractors/Contractor-of-Record.
- (d) Rent or Lease Payments to Nonresidents.
  - (1) Rent or Lease Payments Made to Nonresidents.
  - (2) Types of Rental or Leased Property Subject to Withholding.
- (e) Royalty Payments Made to Nonresidents.
  - (1) Compensation for the Right to Use Natural Resources.

- (2) Compensation for Services Derived from Intangible Property Having a Taxable or Business Situs in California.
- (f) Payments to Corporate Directors.
  - (1) Withholding Not Required.
  - (2) Filing of Information Return.
- (g) Seminar Speakers and Expert Witnesses.
- (h) Income Allocation.
  - (1) Nonresident Contractors.
  - (2) Reliance on Allocations Provided by Payees.
  - (3) Allocation Based on Time.
  - (4) Reasonable Method of Allocation Based on Goods and Services.
  - (5) Allocation of Distributions.

§ 18662-6. Nonresident Withholding, Entertainers, Athletes and Speakers.

- (a) Payments Subject to Withholding.
  - (1) General.
  - (2) Payments Made to Performer's Agents or Promoters.
  - (3) Sound and Lights.
- (b) Request for Waiver or Reduced Withholding Amount.
- (c) Exceptions.
  - (1) California Resident.
  - (2) California Business Entity.
  - (3) Tax Exempt Organization.
  - (4) Total Payments Equal to or Less Than \$1500.
  - (5) Services Performed Outside of California.
  - (6) Withholding Waiver Received.
- (d) Entertainment Venues Having Similar Names.
- (e) Canceled Performances.
- (f) Additional Rules for Athletes.
  - (1) Duty Days.
  - (2) Performance and Signing Bonuses.

§ 18662-7. [Reserved].

§ 18662-8. Reporting and Remitting Amounts Withheld, Penalties and Interest; Other Procedures.

- (a) General.
- (b) Real Estate Sales – Information Returns.
  - (1) Payment Due Dates and Form.
  - (2) Reporting.
- (c) Withholding From Payments Other Than Real Estate Sales.
  - (1) Payment Due Dates.
  - (2) Foreign (Non-U.S.) Partners – Due Dates.
  - (3) Reporting.



- (4) Electronic and Magnetic Media Requirements.
  - (5) Withholding Adjustments.
- (d) Interest and Penalties.
  - (1) Interest.
  - (2) Penalties and Liabilities.
- (e) Separate Information Returns.
- (f) Coordination With Group Returns.

Regulation Section 18662-1 is amended to read:

§ 18662-1. ~~Persons Subject to Withholding Requirements~~Withholding-Generally.

~~Every individual who is a resident of or has a place of business in this State, or subject to the jurisdiction of the laws of this state, and every bank located within the limits of this State, and every partnership, corporation, including a nonprofit organization, joint stock company or association, insurance company or Massachusetts trust, organized under the laws of or having a place of business in this State, or subject to the jurisdiction of the laws of this State, in whatever capacity acting, (including leasees or mortgagors of real or personal property, fiduciaries, employers and any officer or department of this State or any political subdivision or agency of this State, or any city organized under a freeholders charter, or any political body not a subdivision or agency of this State) having the control, receipt, custody, disposal, or payment of income of the character described in Reg. 18662-2 derived from sources within this State by individuals who are nonresidents of this State must withhold from such income as provided in Reg. 18662-2 and transmit to the Franchise Tax Board the amount of tax specified in Reg. 18662-3 at the time and place specified in Reg. 18662-8.~~

(a) Types of Withholding--Application of Regulations.

(1) Overview. California law requires withholding of tax by persons having the control, receipt, custody, disposal, or payment of items of income, generally termed "withhold at source." These regulations apply to withholding of tax at source and do not apply to wage withholding, withholding orders for delinquent taxes, withholding on foreign (non-U.S.) partners and members, backup withholding, or tax collection through the interagency intercept program.

(A) Withholding Tax on Wages. Withholding tax on wages is required by Division 6 of the California Unemployment Insurance Code (section 13000 et seq.) and is administered by the Employment Development Department. (See Revenue and Taxation Code section 18632.) These regulations do not cover withholding tax on wages.

(B) Withholding Orders for Delinquent Taxes. Withholding orders for delinquent taxes may be issued pursuant to Revenue and Taxation Code section 18670 and other statutes relating to involuntary collection, levies and wage garnishments. These regulations do not cover withholding orders for delinquent taxes.

(C) Foreign (Non-U.S.) Partners and Members. Revenue and Taxation Code section 18666 and federal provisions incorporated by reference apply to withholding on foreign (non-U.S.) partners and members who have allocable amounts of effectively connected income to a California trade or business. These regulations do not cover withholding on foreign (non-U.S.) partners and members. (See Treasury Regulation section 1.1446-0 et seq. and Internal Revenue Service (IRS) publications.)

(D) Backup Withholding. With certain limited exceptions, backup withholding is required by California Revenue and Taxation Code section 18664 on payments where federal backup withholding is required. These regulations do not cover withholding taxes on backup withholding.

(E) Interagency Intercept Program. Government Code section 12419.5 authorizes the State Controller's Office to collect money owed to one state agency by a person or entity by deducting the amount owed from any money to be paid to such person or entity by another state agency. This procedure is called an interagency intercept. Payments to a person or entity by the State include but are not limited to a refund of a tax, license, or fee, or a payment for services rendered. These regulations do not cover interagency intercepts.

(b) Withholding of Tax at Source.

(1) General. Non-wage withholding is administered by the Franchise Tax Board under Article 5 of Chapter 2 of Part 10.2 of Division 2 of the Revenue and Taxation Code, section 18661, et. seq., and federal provisions incorporated by reference. Subject to certain exceptions, withholding of tax at source is required from payments derived from California sources and from the sale of any California real property. Withholding is also required when the Franchise Tax Board has notified the payer to withhold.

(2) Real Estate Withholding. Withholding of tax at source is required from the sale or exchange of California real estate by California resident and nonresident individuals and non-California business entities, unless certain exceptions are met. (See Revenue and Taxation Code section 18662, subdivision (e), and Regulation section 18662-3.)

(3) Withholding by Withholding Agent.

(A) Withholding of tax at source is required by persons having the control, receipt, custody, disposal, or payment of items of income made to nonresident individuals and non-California business entities. Withholding is also required where the payee is unknown or unidentified or fails or refuses to provide the payer with sufficient information to determine if withholding is required.

(B) Cross-References. Withholding on Payments. See Regulation section 18662-2 for definitions. See Regulation section 18662-3 for rules relating to real estate withholding. See Regulation section 18662-4 for rules applicable to withholding on payments to nonresidents. See Regulation section 18662-5 for rules relating to other types of payments and withholding obligations. See Regulation section 18662-6 for nonresident withholding relating to entertainers, athletes, and speakers. See Regulation section 18662-7 as to withholding rules for domestic (U.S.) pass-through entities. See Chapter 11 of Part 10 of Division 2 of the Revenue and Taxation Code (sections 17951-17955) and applicable regulations for rules relating to determination of gross income from sources within California.

(4) Reporting and Remitting Amounts Withheld. Rules applicable to the process of reporting and remitting withholding to the Franchise Tax Board, plus additional liabilities, penalties and interest for failures to do so, are set forth in Regulation section 18662-8.

(5) Credit for Tax Withheld. See Revenue and Taxation Code section 19002 and Regulation section 19002 for the timing and the application for crediting of taxes withheld and remitted to the Franchise Tax Board.

(c) Withholding Required After Notification. Withholding of tax at source is required when a person is notified in writing by the Franchise Tax Board to withhold tax from California source income, or as may be otherwise prescribed by the Franchise Tax Board in forms and instructions.

Example: A promoter of an entertainer is renting a venue in California for a performance to be held next June. The Franchise Tax Board contacts the promoter that withholding is required for amounts received for the June performance. The promoter has not complied with Franchise Tax Board's notices to withhold on previous performances. The Franchise Tax Board issues to the venue owner/operator a Notice to Withhold Tax at Source that withholding is required for amounts paid for the June performance. The venue owner/operator must withhold 7% on all payments, including ticket sales and commissions, for this performance.

Note: Authority cited: Section 19503, Revenue and Taxation Code.

Reference cited: Section 18662, Revenue and Taxation Code.

Regulation Section 18662-2 is amended to read:

§ 18662-2. Income Subject to Withholding and Requirements for Withholding Definitions.

(a) Buyer. The term "buyer" includes the buyer or any other transferee of property.

(b) California Business Entity. For purposes of withholding, the phrase "California business entity" is a "business entity" as defined in Regulation section 23038(b)-2(a), that is incorporated, organized, or formed, and existing, under the laws of California, or is qualified through the Office of the Secretary of State to transact intrastate business. A business entity that has not qualified to transact intrastate business (such as a corporation engaged exclusively in interstate commerce) will be considered as having a permanent place of business in California only if it maintains an office in California that is permanently staffed by its employees.

(c) California Real Estate. The term "California real estate" has the same meaning as defined in Revenue and Taxation Code section 18662, subdivision (e)(5). For purposes of Regulation sections 18662-0 through 18662-8, an ownership interest does not include an option to acquire real estate, unless the option is exercised and the property transferred.

(d) California Resident. The term "California resident" includes every individual who is in California for other than a temporary or transitory purpose, and any individual domiciled in California who is absent for a temporary or transitory purpose. Generally, an individual who comes to California for a purpose extending over a long or indefinite period will be considered a resident. An individual who comes to perform a particular contract of short duration will be considered a nonresident. (See Revenue and Taxation Code section 17014 and Regulation section 17014.)

(e) California Trust or Estate. For purposes of withholding, a trust is considered a California trust if at least one fiduciary is a California resident or a California business entity, or if the decedent was a California resident on the date of death. An estate is considered a California estate for withholding purposes when the decedent was a California resident on the date of death.

(f) Exempt Organization. The term "exempt organization" means an organization that meets the requirements of Chapter 4 of Part 11 of the Revenue and Taxation Code (commencing with section 23701) or Subchapter F of the Internal Revenue Code (commencing with section 501), that is exempt from withholding under this regulation.

(g) Individual. The term "individual" means a natural person. (See Revenue and Taxation Code section 17005.)

(h) Items of Income. For purposes of withholding, the term "income" includes items of income that are included in the information return reporting requirements of Article 5 of Chapter 2 of Part 10.2, Division 2 of the Revenue and Taxation Code (section 18631 et seq.) and federal provisions incorporated by reference. The items of income include, but are not limited to interest, dividends, rents, royalties, prizes and winnings, premiums, annuities,

emoluments, compensation for personal services including bonuses, partnership income or gains, and other fixed or determinable annual or periodical gains, profits and income. ~~Withholding of tax at the source is required in the case of payments to nonresidents of compensation for personal services rendered in this State, except for wages subject to withholding under Section 13020 of the Unemployment Insurance Code or exempt therefrom under Section 13009 of the Unemployment Insurance Code or exempt from state withholding under federal law. Withholding at source is also required in the case of rentals or royalties for the use of, or for the privilege of using in this State, patents, copyrights, secret processes and formulas, good will, trademarks, brands, franchises, and other like property of such intangible property having a business or taxable situs as defined in Regs. 17951-1 through 17951-5, 17952 and 17953 in this State, and payments of prizes, premiums, rewards, winnings, etc., to nonresidents participating, or entering cars, horses, etc. in races and other contests in this State.~~

~~In the case of payments to nonresidents of items of income not specified in the second paragraph of this regulation and in the case of persons not making payments to nonresidents of the items of income specified in the first paragraph of this regulation but having the control, receipt, custody or disposal of such income, withholding of tax at source is required when the person subject to withholding as specified in Reg. 18662-1 is notified by the Franchise Tax Board or a duly authorized representative to withhold tax from such income.~~

~~Compensation for personal services includes wages, salaries and any other remuneration such as, for example, payment of expenses of nonresident employees for services rendered in this State, commissions paid to nonresident salesmen or agents for orders received on sales made in this State, fees for professional services rendered here by nonresidents, and payments to nonresident actors, singers, performers, entertainers, wrestlers, boxers, etc., for performances in this State. Compensation for personal services includes payments to independent contractors, such as leaders, managers, or owners of bands, orchestras, dance teams, circuses, and similar groups of artists, entertainers or performers pursuant to contracts under which such leaders, managers or owners agree to furnish the services of their bands, orchestras, teams, circuses, or other groups within this State.~~

~~Withholding pursuant to this regulation is not required unless and until income payments with respect to each payee by the same payor either exceed \$1,500 during the calendar year or the payor is directed to withhold by the Franchise Tax Board.~~

(i) Non-California Business Entity. For purposes of withholding, a non-California business entity means any business entity that does not meet the requirements of a California business entity as set forth herein.

(j) Nonresident. A "nonresident" or "nonresident individual" is an individual who does not meet the requirements of a California resident.

(k) Nonresident alien. "Nonresident alien" has the same meaning as defined in Internal Revenue Code section 7701(b)(1)(B).

(l) Nonresident Estate or Trust. For purposes of withholding, the term "nonresident estate or trust" means an estate or trust that does not meet the requirements to be a California estate or trust.

(m) Owner of a Pass-Through Entity [Reserved].

(n) Partner. The term "partner" has the same meaning as defined in Revenue and Taxation Code section 17008. For purposes of withholding, members of limited liability companies classified as partnerships and owners of multiple-owner entities are included in the term "partner" under Regulation sections 18662-0 through 18662-8.

(o) Partnership. The term "partnership" has the same meaning as defined in Revenue and Taxation Code section 17008. This includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not a trust, estate, or corporation. For purposes of withholding, limited liability companies classified as partnerships, limited partnerships, and limited liability partnerships are treated as partnerships under Regulation sections 18662-0 through 18662-8.

(p) Pass-Through Entity [Reserved].

(q) Payee. The term "payee" includes, but is not limited to, any person, partner, member, corporation, limited liability company, partnership, fiduciary, business entity, association, joint venture (whether or not classified as a disregarded entity for tax purposes), estate, trust, foreign entity, agency, or political subdivision that receives payments from a payer. The term "payee" also includes any person who receives payments or distributions from a pass-through entity, estate or trust.

(r) Payer. The term "payer" means the person who makes a payment or a distribution to a payee. The payer generally includes a withholding agent. The term also includes any person that makes a payment to an intermediary, pass-through entity, or person to the extent the intermediary, pass-through, or person provides a Form W-9 or other appropriate information relating to a payee so that the payment can be reported under Chapter 61 of the Internal Revenue Code.

(s) Permanent Place of Business. A business entity has a "permanent place of business" in California if it is organized and existing under the laws of California or, if a foreign corporation, it has qualified to transact intrastate business. A business entity which has not qualified to transact intrastate business, for example, a corporation engaged exclusively in interstate commerce, will be considered as having a permanent place of business in California only if it maintains a permanent office in California which is permanently staffed by its employees.

(t) Person. The term "person" has the same meaning as defined in Revenue and Taxation Code section 17007 and includes individuals as well as business entities.

(u) Real Estate Escrow Person. The term "real estate escrow person" has the same meaning as defined in Revenue and Taxation Code section 18662(e)(6), plus applicable regulations, and includes any attorney, escrow company, or title company, responsible for closing the transaction, or any other person who receives and disburses the consideration or value for the interest or property conveyed.

(v) Seller. The term "seller" includes the seller or any other transferor of property.

(w) Transferee. The term "transferee" of real property has the same meaning as in Revenue and Taxation Code section 18662, subdivision (e), and includes the buyer of the property, intermediary or exchange accommodator where the context so requires.

(x) Transferor. The term "transferor" of real property has the same meaning as in Revenue and Taxation Code section 18662, subdivision (e), and includes the seller of the property, intermediary or exchange accommodator where the context so requires.

(y) Withholding Agent. The term "withholding agent" means the person that has the control, receipt, custody, disposal, or payment of an item of income of a person subject to withholding. Any person who meets the definition of a withholding agent is required to remit any tax withheld and to make the information returns prescribed under forms and instructions by the Franchise Tax Board. The term "withholding agent" also means the person charged by the law or by the Franchise Tax Board's order or regulation with the duty to withhold any tax, interest or penalties from payments to the taxpayer and to remit such amounts over to the Franchise Tax Board.

Note: Authority cited: Section 19503, Revenue and Taxation Code.  
Reference cited: Section 18662, Revenue and Taxation Code.



Regulation section 18662-3 is amended to read:

§ 18662-3. Amount to Be Withheld Real Estate Withholding.

(a) General. ~~The amount of tax to be withheld shall be computed by applying a rate of 7%, or such lesser rate as authorized in writing by the Franchise Tax Board. Withholding of tax at source is required on any disposition from the sale or exchange of California real estate by California resident and nonresident individuals and non-California business entities. The rate of withholding is 3 1/3% of the sales price, but the seller may elect an alternate withholding calculation based on the gain required to be recognized from the sale. The requirement to withhold is the responsibility of the buyer, but may be performed by the real estate escrow person on the buyer's behalf. No withholding is required under certain circumstances, or if an exemption certificate is signed, such as the property was the seller's principal residence or no gain is recognized from the sale. The Franchise Tax Board may audit escrow documents to verify compliance.~~

(b) Statutory Basis and Rates. ~~At the request of either the payer or payee, the Franchise Tax Board may consider documentation to the effect that the 7% rate will result in overwithholding. After considering such documentation, the Franchise Tax Board may waive the withholding requirements, in whole or in part, or authorize the use of a lower withholding rate. As a further condition for waiver or for authorizing a lower withholding rate, the payee will be required to assure the Franchise Tax Board, by bond, deposit or otherwise, that the source income withholding requirements applicable to the payee as a payor will be complied with. Revenue and Taxation Code section 18662, subdivision (e), requires withholding of tax at source from any disposition, sale or transfer of California real property at an amount equal to 3 1/3% of the sales price, unless an election is made to use an alternative withholding calculation based on gain required to be recognized from the sale. The alternative withholding calculation shall be based on the maximum applicable tax rate under Revenue and Taxation Code sections 17041, 23151 and 23186.~~

(c) Who Must Withhold – Required Notification and Responsibility.

~~The Franchise Tax Board's waivers and Notices to Withhold reflecting a withholding rate less than 7% shall be in writing and shall be mailed to the payor. If the payor has already withheld prior to the receipt of a waiver or Notice to Withhold, the payor may make a payment to the payee of the amount of overwithholding, if any.~~

(1) Notification. ~~Revenue and Taxation Code section 18668, subdivision (e)(1), requires the real estate escrow person to provide the buyer with written notice of the withholding requirements, unless the buyer is an intermediary or accommodator in a deferred exchange.~~

(2) Penalties for Failure to Provide Notice. ~~If the real estate escrow person fails to provide the buyer with written notice, a penalty may be assessed of \$500 or 10% of the amount required to be withheld, whichever is greater, unless it is shown that the failure to notify the buyer is due to reasonable cause.~~

(3) Buyer's Responsibility to Withhold May be Delegated. Once the buyer is notified, it is the buyer's responsibility to withhold. However, the real estate escrow person may assist the buyer in complying with the withholding requirements by performing or assisting in the withholding and the remitting the required withholding. The real estate escrow person may charge a fee for this assistance not to exceed the amount set forth in Revenue and Taxation Code section 18662, subdivision (e).

(d) Exemption and Withholding Requirements. No withholding is required if the seller establishes one of the following under subdivision (d)(1) or (d)(2):

(1) Full Exemption. The Franchise Tax Board may provide forms and instructions necessary to establish that no withholding is required in the following instances:

(A) Seller is a Corporation or Partnership. No withholding is required for a corporation or partnership incorporated or qualified to do business in California (or where the entity continues to have a permanent place of business and maintains a permanent staff within California after the sale. Where the seller is a disregarded entity for tax purposes, no withholding is required if the owner of the disregarded entity is incorporated or qualified to do business in California or continues to have a permanent place of business and maintains a permanent staff within California after the sale.

(B) Total Sales Price of \$100,000 or Less. No withholding is required unless the sales price of the property conveyed exceeds \$100,000. "Total sales price" is generally the same amount as required for information reporting purposes as shown on the federal form 1099-S. (See Treasury Regulation section 1.6045-4.)

(C) Deferred Exchange. No withholding is required other than by an intermediary or an accommodator in a deferred exchange, unless written notification of the requirements has been provided by the real estate escrow person.

(D) Foreclosure. No withholding is required as part of a foreclosure when the transferee acquires California real property under one of the following circumstances:

1. At a sale pursuant to a power of sale under a mortgage or deed of trust.
2. At a sale pursuant to a decree of foreclosure.
3. By a deed in lieu of foreclosure.

(E) Bank Acting as a Trustee. No withholding is required when the transferor is a bank acting as a trustee, other than a trustee of a deed of trust.

(2) Transfers Requiring an Exemption Certificate to Exempt the Sale From Withholding. No withholding is required if the transferor or seller completes and signs

an exemption certificate, stating under penalty of perjury, that one of the following applies:

(A) Principal Residence. No withholding is required if the seller certifies that the property conveyed was his or her principal residence within the meaning of Internal Revenue Code section 121, as incorporated by and modified by the Revenue and Taxation Code, or that the last use of the property was as the transferor's principal residence.

1. Generally, a home will qualify as a principal residence if, during the five-year period ending on the date of sale, the seller owned and used the property as his or her main home for at least two years.

2. There are exceptions to the two-year rule if the primary reason the seller is selling the home is due to a change in the place of employment, health, or other unforeseen circumstance, such as death, divorce, or loss of job. (See Internal Revenue Code section 121 and Treasury Regulation sections 1.121-1 through 1.121-5.)

3. If the property does not qualify for an exclusion under Internal Revenue Code section 121, the seller may claim the exclusion from withholding if the property was last used as the seller's principal residence within the meaning of Internal Revenue Code section 121, without regard to the two-year time period.

4. Where California law differs from federal law, California law applies. The Franchise Tax Board shall explain these differences in forms and instructions.

(B) Involuntary Conversions. No withholding is required if the seller certifies that the transfer is the result of an involuntary conversion that qualifies for deferral of gain under Internal Revenue Code section 1033 and that he or she intends to replace the property with qualified property within the required time period under Internal Revenue Code section 1033.

(C) Loss or Zero Gain. No withholding is required if the seller certifies that there is either a loss or zero gain for California income tax purposes from the sale, which results when the seller's adjusted basis in the property is more than or equal to the selling price (less selling expenses). In computing gain, the seller may use previously deferred passive activity losses that directly relate to the property being sold. He or she may not use losses that are not directly related to the property, such as passive activity losses or carry forwards from a different property, capital loss carry forwards, stock losses, or net operating losses.

(D) Contributed Capital – Transfers to a Controlled Corporation or Partnership. No withholding is required where the transferor or seller certifies that the transfer qualifies for nonrecognition treatment under Internal Revenue Code section 351 (property transferred to a corporation controlled by the transferor) or Internal Revenue Code section 721 (property contributed to a partnership in exchange for a partnership interest).

(E) Seller is a Corporation. No withholding is required if the seller certifies that it has either qualified with the California Secretary of State or has a permanent place of business in California. This includes a limited liability company (LLC) taxable as a corporation for federal and California income tax purposes.

(F) Real Estate Investment Trusts (REIT). No withholding is required if the seller certifies that it is a REIT that is treated as a corporation and the REIT has a permanent place of business in California.

(G) Seller is a Partnership. No withholding is required if the seller certifies it is a California partnership, or qualified to do business in California (or an LLC that is classified as a partnership for federal and California income tax purposes) that is not disregarded for federal and California income tax purposes.

(H) Tax Exempt Entities. No withholding is required if the seller certifies it is a tax-exempt entity under California or federal law (e.g. government agency, Resolution Trust Corporation, or exempt, charitable, religious, or educational organization).

(I) Insurance Companies. No withholding is required if the seller certifies that it is an insurer within the meaning of Section 28 of Article XIII of the California Constitution that pays the California gross premiums tax.

(J) Other Entities. No withholding is required if the seller certifies it is either an individual retirement account (IRA), qualified pension plan, or charitable remainder trust.

(3) Transfers That May Partially or Fully Exempt the Sale From Withholding.

(A) IRC Section 1031 Exchanges. No withholding is required on the initial transfer where the seller certifies that the transfer will qualify as:

1. A Simultaneous Like-Kind Exchange. However, if the seller receives proceeds (including excess debt relief) or non-like-kind property from the sale (boot) in excess of \$1,500, withholding is required at 3 1/3% of that amount or the alternative withholding calculation, if so elected.

2. A Deferred Like-Kind Exchange. However, if the seller receives any proceeds (including excess debt relief) or non-like-kind property from the sale (boot) in excess of \$1,500, withholding is required at 3 1/3% of that amount or the alternative withholding calculation, if so elected.

3. Failed Exchange. Notwithstanding a seller's certification, if the exchange fails, does not occur, or does not meet the Internal Revenue Code section 1031 requirements, the intermediary or accommodator must

withhold at 3 1/3% of the sales price or the alternative withholding calculation, if so elected.

(B) Installment Sales. The real estate escrow person must withhold 3 1/3% or the alternative withholding calculation certified on the principal portion (e.g. down payment or first installment payment) received in escrow upon closing.

1. The buyer must complete and sign a Real Estate Withholding Installment Sale Acknowledgement. The buyer must give the acknowledgement, along with a copy of the promissory note, to the real estate escrow person to remit to the Franchise Tax Board. The buyer must withhold and remit 3 1/3% or the alternative withholding calculation certified on the principal portion of all subsequent payments.

2. Installment Sale Payoff. The real estate escrow person must withhold 3 1/3% or the alternative withholding calculation certified on the principal portion of a seller-financed installment sale payoff or prepayment in escrow upon closing.

(e) Withholding on Special Entities.

(1) Grantor Trusts. If the trust is a grantor trust, then the seller is the grantor and withholding is required. A grantor trust is a trust where the grantor retains substantial control and remains the owner (e.g. the right to cancel or revoke the trust). A grantor trust is disregarded for federal and California income tax purposes. Where the seller is the grantor trust, withholding is remitted and credited to the grantor. Where applicable, withholding forms should be completed using the individual's (grantor's) information.

(2) Trusts. If the trust is other than a disregarded grantor trust (e.g. an inter vivos or living trust), then the seller is the trust and withholding is required. Where applicable, withholding forms should be completed using the name of the trust and the trust's federal employer identification number (FEIN).

(3) Bankruptcy Trusts and Estates. Withholding is required when a bankruptcy trust or estate sells the property.

(4) Estates. Withholding is generally required when an estate sells real property. However, if the property being sold qualifies as the decedent's principal residence or otherwise qualifies under the exemption certificate, withholding is not required.

(5) Conservatorships and Receiverships. Withholding is required unless the conservatee or debtor (in receivership) qualifies under requirements of the exemption certificate. The conservator or receiver should complete the real estate withholding exemption certificate using the conservatee's or debtor's information.

(6) Relocation Companies. Sales to relocation companies are subject to the same rules as other sales, and withholding is required. There is no withholding on the sale if the relocating seller certifies that the property was the seller's principal residence or if the seller otherwise qualifies under the requirements of the exemption certificate. Relocation companies themselves are subject to the same rules as other non-individuals.

Example 1. A relocation company resells California real property to a third party. There is no withholding on the sale if the relocation company is a California corporation, has qualified to do business in California, or otherwise qualifies under the requirements of the exemption certificate. If the relocation company is not a California corporation, has not qualified to do business in California, or does not meet the requirements of the exemption certificate, withholding is required.

Example 2. An employer that holds title to California real property gives a relocation company power of attorney to act on its behalf in the sale of the property to a third party. No withholding is required on the sale if the employer certifies that it is a California corporation, has qualified to do business in California, or has a permanent place of business in California, or otherwise qualifies under the requirements of the exemption certificate. If the employer has not met any of the above, withholding is required. Since the relocation company does not hold title, the employer must meet the withholding obligations.

(f) Procedures.

(1) Exemption Certificate and Estimated Gain or Loss Certificate. If a seller seeks to qualify for no withholding under the requirements set forth in the real estate withholding exemption certificate, the seller must complete the withholding exemption certificate prior to the close of the real estate transaction to claim an exemption from withholding. Failure to provide a completed and signed real estate withholding exemption certificate by the close of the real estate transaction will result in withholding. If the seller seeks to establish a loss or zero gain, the seller must also complete and sign a withholding exemption certificate and a real estate withholding – computation of estimated gain or loss certificate.

(2) Retention of Withholding Exemption Certificate. The Franchise Tax Board may specify by forms and instructions whether the exemption certificate must be filed with the Franchise Tax Board, or retained by the real estate escrow person for submission, upon request, at a later date to the Franchise Tax Board. If required to be filed immediately, the Franchise Tax Board may specify the conditions for filing and the due date of such filing. The real estate escrow person must retain a copy of the withholding exemption certificate for five years following the closing date of the transaction.

(3) Verification. Real estate escrow persons are only required to verify certifications to the extent that they have actual knowledge of the facts. If they have no actual knowledge of the facts, then they must only verify that the certificate is complete and signed. The real estate escrow persons will be relieved of the withholding

requirements if they rely in good faith on a completed and signed real estate withholding certificate. Real estate escrow persons should not rely upon an incomplete or unsigned certificate.

Example 1: A seller completes a worksheet calculating the estimated gain or loss and certifies a loss on the transaction. The Franchise Tax Board does not require the real estate escrow person to verify the amounts shown on the worksheet.

Example 2: A seller completes a real estate withholding exemption certificate and certifies that the sale is an installment sale. However, the buyer has not provided a completed and signed installment sale acknowledgement and promissory note to the real estate escrow person. The real estate escrow person may not rely on the real estate withholding exemption certificate and is required to withhold on this transaction.

Example 3: A seller completes a real estate withholding exemption certificate and certifies that a California partnership is selling the property, but the real estate escrow person has actual knowledge that the recorded title of the property is not in the name of the California partnership. The real estate escrow person may not rely on the real estate withholding exemption certificate and is required to withhold on this transaction.

(4) Electing the Alternate Withholding Calculation. The seller making the election must complete and sign a real estate withholding – computation of estimated gain or loss certificate, and sign a completed Real Estate Withholding Tax Statement. The signature certifies the gain required to be recognized and the alternate withholding calculation. The Franchise Tax Board may specify by forms and instructions whether the forms must be filed with the Franchise Tax Board, or retained by the real estate escrow person for submission, upon request, at a later date to the Franchise Tax Board. If required to be filed immediately, the Franchise Tax Board may specify the conditions for filing and the due date of such filing. The seller must retain the real estate withholding – computation of estimated gain or loss certificate for five years following the closing date of the transaction.

(g) Special Rules.

(1) Multiple Family Units. If the property sold is a multiple family unit (duplex, triplex, apartment building, etc.) and the seller lived in one of the units as their principal residence, withholding is required for the portion of the sales price that is not certified as a principal residence. The sales price should be allocated between the principal residence and the remainder of the units using the same method that the seller used to determine depreciation deductions. Withholding is required when the total sales price of the property (all units) exceeds \$100,000, even if the portion of the sales price allocable to the non-principal residence portion of the property does not exceed \$100,000.

(2) Multiple Sellers. When there are multiple sellers, the withholding amount is calculated by applying the withholding rate to each seller's proportionate share of the total sale price.

Example 1: Withholding at 3 1/3% of total sale price:

Total sale price \$200,000

Sellers' ownership percentages:

A = 20%, B = 30%, C = 50%

Withholding per seller:

A  $\$200,000 \times 20\% \times .0333 = \$1,332$

B  $200,000 \times 30\% \times .0333 = 1,998$

C  $200,000 \times 50\% \times .0333 = 3,330$

Example 2: Alternative withholding calculation, assuming a maximum tax rate of 9.3% in the year of sale:\*

Gain on sale \$200,000

Sellers' ownership percentages:

A = 20%, B = 30%, C = 50%

Withholding for individual seller:

A  $\$200,000 \times 20\% \times .093 = \$3,720$

B  $200,000 \times 30\% \times .093 = 5,580$

C  $200,000 \times 50\% \times .093 = 9,300$

\*Note: The applicable tax rate is subject to change.

(3) Sellers on Title for Incidental Purposes. If the incidental sellers have no financial ownership, then their ownership percentage is zero and there is no withholding required for them.

Examples of sellers who are on title for incidental purposes are:

Example 1: A father is on title only because he cosigned to help his daughter qualify for a loan. The first name on the loan is that of the daughter who pays the loan payments. If father completes a real estate withholding exemption certificate showing zero percentage of ownership, no withholding is required on the proceeds due to the father's ownership interest. The daughter is the beneficial owner of all of the property and is subject to the normal withholding requirements.

Example 2: A son is on title only to receive the real property as a beneficiary upon his mother's death. The real property is sold while the mother is alive. If the son completes a real estate withholding exemption certificate showing zero percentage of current ownership, no withholding is required on the proceeds due to the son's ownership interest. The mother is the owner of all of the property and is subject to the normal withholding requirements.

(4) Sale of Multiple Parcels. Sales of multiple parcels within the same escrow agreement constitute one transaction for purposes of determining the withholding requirements under this regulation. Withholding is required where the total sale price



of all properties exceeds \$100,000 even though the sale price of each separate parcel in the transaction is under \$100,000.

Example: Parcel A is sold for \$50,000. Parcel B and Parcel C are sold for \$10,000 and \$60,000, respectively. All three parcels are sold within the same escrow agreement. Since the total sales price equals \$120,000, withholding is required.

(5) Leaseholds/Options. The sale of a leasehold is considered a sale of a real property interest and withholding is required. Withholding is required on an option to buy real property that has been exercised where the property has been transferred by the owner.

(6) Personal Property Included in Real Estate Transaction. If personal property is included in the sales price of the real property, withholding is computed on the full amount. If the price of the personal property is stated separately in the sales contract, withholding on the personal property amount is not required.

(7) Short Sale Transactions. Real property sold for less than the amount owed on the mortgage is not excluded from withholding, unless the seller qualifies under the requirements of the exemption certificate. The parties must arrange to cover payment of the withholding.

Note: Authority cited: Section 19503, Revenue and Taxation Code.  
Reference cited: Section 18662, Revenue and Taxation Code.

Regulation section 18662-4 is amended to read:

§ 18662-4. Withholding of Delinquent Taxes Due from Both Resident and Nonresident Taxpayers. Withholding on Payments (Nonresident Withholding) – General.

~~In addition to withholding from payments of income to nonresident taxpayers in accordance with the requirements of Regs. 18662-1 to 18662-4, the individuals, firms and companies mentioned in Reg. 18662-1 must, upon notice and demand from the Franchise Tax Board or its authorized representatives, withhold from any credits or other personal property or other things of value due any individual, estate or trust, the amount of any tax due under the law from such individual, estate or trust. Furthermore, effective May 30, 1957, firms and companies mentioned in Reg. 18662-1 must, upon notice and demand, withhold from any credits or other things of value the amount of any liability incurred by any person for his failure to withhold upon notice and demand amounts due under the law from a taxpayer. The amounts so withheld must be transmitted to the Franchise Tax Board immediately.~~

(a) Nonresident Individuals and Non-California Business Entities; De Minimis Amounts; and Rate.

(1) Nonresident Individuals and Non-California Business Entities. Except as otherwise provided, withholding of tax at source is required for payments of California source income made to nonresident individuals and non-California business entities, including, but not limited to, such other entities as nonresident estates or trusts, suspended or forfeited corporations, and foreign (non-U.S.) entities. Withholding on payments of income to resident individuals and California business entities is optional; however, if withholding and remitting of tax at source is performed, it must be performed according to the rules applicable to mandatory withholding of tax.

(2) De Minimis Amounts. Withholding of tax at source is optional and at the discretion of the withholding agent on the first \$1,500 on income paid for the calendar year to each payee.

(3) Rate. The withholding rate is seven percent of the gross payment or distribution amount.

(4) Cross-References. See Regulation sections 18662-5 (Other Types of Payments and Withholding), 18662-6 (Nonresident Withholding, Entertainers, Athletes and Speakers), and 18662-7 (Withholding Rules for Domestic (U.S.) Pass-through Entities) for specific requirements.

(b) Optional Withholding or No Withholding Required. Generally, withholding of tax at source is optional and not required on payments of California source income to the following:

(1) California Residents. If a California resident receives California source income, withholding is not required. Withholding agents may use reasonable methods to determine the California residency of payees. The Franchise Tax Board may provide

forms and instructions necessary to assist withholding agents in determining residency status.

Example 1: Withholding agents may send their payees an exemption certificate. Payees may use this form to certify their residency status, provided that the withholding agent may only rely upon an exemption certificate if payees include their taxpayer identification number.

Example 2: Withholding agents may rely on a California street address as an indication of a payee's residency status. If the payee has a California street address, no withholding is required. An exemption certificate may be used to verify residency status. A valid California street address does not include a California post office box, or an "in care of" address. If a change of address occurs, the withholding agent must reevaluate the payee's residency status.

## (2) California Business Entities.

If a non-California business entity payee is doing business in California and is receiving California source income, withholding is required unless the payee qualifies under the requirements of the exemption certificate or the amount is excluded from amounts subject to withholding.

If a corporate payee has not qualified with the Office of the Secretary of State and does not have a permanent place of business in this State, but is a member of a combined report filed under Regulation section 25106.5 and included in a group return filed pursuant to that regulation, then the key corporation is treated as a guarantor and surety for the other members, so that the corporate payee is deemed to be a California Business Entity.

The following are examples of methods the Franchise Tax Board will consider reasonable for withholding agents to rely upon in determining if a corporation has a permanent place of business in California or is qualified to do business in this State for purposes of these withholding regulations:

Example 1: Withholding agents may rely on a completed exemption certificate. A completed exemption certificate showing the payee's taxpayer identification number and stating that the corporation has a permanent place of business in California (or is included in a group return with a California key corporation) protects the withholding agent from penalties for failure to withhold, unless the withholding agent has actual knowledge that the statement in the certificate is false.

Example 2: If a corporation is incorporated in California or qualified to do business in California with the Office of the Secretary of State, it is a California business entity for withholding purposes. Withholding agents can determine if a corporate payee is a California corporation or qualified to do business in this state by contacting the Office of the Secretary of State.

(3) Tax Exempt Organizations. Withholding of tax at source is not required on payments of California source income to tax exempt organizations that are exempt either under California or federal law.

(4) California Estates and Trusts. Withholding of tax at source is not required on payments of California source income to California estates and trusts.

(5) Bank and Banking Associations. Withholding of tax at source is not required on payments of California source income where the payee is a bank or banking association.

(6) Sale of Goods. Withholding of tax at source is not required on payments for the sale of goods.

(7) Services of a Nonresident Outside of California. Withholding of tax at source is not required on payments for services provided by a nonresident that were performed outside of California.

(8) Intangible Personal Property. Withholding of tax at source is not required on payments of California source income from intangible personal property, such as interest and dividends, unless the property has acquired a business situs in California. (See Regulation section 18662-5.)

(9) Motor Carrier Compensation. Withholding of tax at source is not required on payments of California source income to a motor carrier providing transportation in two or more states, subject to section 11504(b) of Title 49 of the United States Code.

(10) Wages Paid to Employees. Withholding of tax at source is not required on payments of California source wages to employees. However, wages are subject to wage withholding. Employee wage withholding is covered by the Unemployment Insurance Code and administered by the Employment Development Department.

(11) Nonresident Corporate Directors. Withholding of tax at source is not required on payments of California source income to a nonresident corporate director for director's services. However, information returns for nonresident corporate directors for director's services must be filed in accordance with Revenue and Taxation Code section 18662, subdivision (g). Nonresident directors must file California tax returns if they otherwise meet return filing requirements or may elect to be included in a group return pursuant to Revenue and Taxation Code section 18536.

(12) Insurance Companies, Individual Retirement Plans, Pension or Profit Sharing Plans. Withholding of tax at source is not required on gross premiums paid to insurance companies. Withholding of tax at source is not required on payments of income made to individual retirement accounts or federally qualified pension or profit sharing plans.

(13) Income from Qualified Investment Securities. Withholding of tax at source is not required on payments of income from qualified investment securities excluded from taxable income of a nonresident or part-year resident under Revenue and Taxation Code sections 17955 and 23040.1.

(c) Withholding Exemption Certificates.

(1) General. Where the payee otherwise properly certifies that it qualifies under the requirements of an exemption certificate, no withholding is required. The certification does not need to be renewed annually. The certification remains valid until the payee's status changes. The withholding agent should evaluate the need for securing a new certificate when any indication of a change in residency status occurs, such as a change of address, etc.

(2) Incomplete or Invalid Exemption Certificates. An incomplete exemption certificate is invalid and the withholding agent should not accept it. If the withholding agent receives an incomplete exemption certificate, the withholding agent is required to withhold tax on payments made to the payee until a valid certificate is received. In lieu of a completed exemption certificate on the preprinted form, the withholding agent may accept as a substitute a letter from the payee explaining why the payee is not subject to withholding. The letter must contain all the information required on the certificate in similar language, including the penalty of perjury statement and the payee's taxpayer identification number. The withholding agent may accept facsimiles or photocopies of the withholding forms.

(3) California Address. Withholding agents may accept a completed exemption certificate when an individual certifies residency but does not show a California address, unless the withholding agent believes the exemption certification is fraudulent. The Franchise Tax Board may provide procedures for retaining and/or filing certificates by forms and instructions. Whether or not a copy of the exemption certificate is required to be filed, the withholding agent must retain a copy of the exemption certificate or substitute for at least five years after the last payment to which the certificate applies, and provide it upon request to the Franchise Tax Board.

(4) False Certificate. A withholding agent who knowingly accepts a false exemption certificate is subject to the liabilities and penalties relating to failure to withhold.

(d) Information Returns Also Required. A withholding agent who withholds tax at source may also be required to file an information return. The Franchise Tax Board may provide the form and manner of filing information returns and withholding statements by forms and instructions, including circumstances where they may be filed together on a single document or filed electronically.

(e) Waivers and Reduced Amounts. In some cases, the Franchise Tax Board may authorize a waiver or a reduced withholding amount.

(1) Waivers. Requests shall be made in the form and manner that the Franchise Tax Board shall provide by forms and instructions. In general, the payee must show that the payee has a history of timely filing and payment. Waivers may also be requested as provided in forms and instructions where the payee is a newly-admitted partner, member, or S corporation shareholder, a member of a combined report electing to be included in a California group return with a key corporation within the meaning of Regulation section 25106.5(b)(13) and (14), or in unique circumstances where withholding would not be administratively practical. Requests for waivers must be submitted before the payment is made so the Franchise Tax Board can issue a determination letter before the withholding is required. Withholding is required unless the Franchise Tax Board issues a determination letter authorizing a waiver.

(2) Request for Reduced Withholding Amount. Payees in some circumstances can request a reduced withholding amount to reflect expenses and costs or other special circumstances that would justify a reduced amount. Requests shall be made in the form and manner that the Franchise Tax Board shall provide by forms and instructions.

(3) Other Conditions As May Be Required. After considering requests for waiver or reduced withholding amount, the Franchise Tax Board may, as a further condition, require the payee to assure the Franchise Tax Board by bond, deposit, or other requirements as necessary, that the withholding requirements applicable to the payee will be complied with.

(f) Requirement to File a California Return. Withholding does not relieve the payee of the obligation to file a California income tax return. For individuals a California return is required if the nonresident individual has any income from California sources and has a California tax liability. (See Revenue and Taxation Code section 18501.) Business entities must file returns if they are subject to franchise or income tax, are doing business in California, or have any California source income for the taxable year. No refund or credit of withholding may be made to an individual or entity that fails to file a tax return for the year. (See Revenue and Taxation Code section 19307.)

(g) Suspended and Forfeited Corporations. Withholding of tax at source is required from any payment to a suspended or forfeited corporation if the payer has knowledge of, or has reason to know of, the suspension or forfeiture.

Note: Authority cited: Section 19503, Revenue and Taxation Code.  
Reference cited: Section 18662, Revenue and Taxation Code.

Regulation Section 18662-5 is amended to read:

§ 18662-5. Remedies of Taxpayer~~Other Types of Payments and Withholding Obligations.~~

~~If, as a result of the action of a withholding agent in transmitting the tax to the Franchise Tax Board, taxpayer's tax is overpaid, the taxpayer is entitled to file a claim for the refund or that overpayment, and to appeal to the Board of Equalization or to an action in the courts, to the same extent as if the taxpayer himself had made the overpayment. Refund claims must be filed within four years after the last day prescribed for the filing of the taxpayer's return, or within one year after the payment of the tax by the withholding agent, whichever period expires the later. Interest is to be allowed in all such cases, to be computed at 6 percent per year from the 15<sup>th</sup> day of the fourth month following the close of the taxable year for which such amounts were withheld. The taxpayer cannot hold the withholding agent liable for any payment made to the Franchise Tax Board pursuant to Reg. 18662-1 to 18662-5, unless the amount withheld is refunded to the withholding agent.~~

(a) Payments to Nonresidents Subject to Withholding.

(1) General. As explained in Regulation section 18662-4, withholding agents are required to withhold from payments or distributions of California source income made to a nonresident when the payments or distributions are greater than \$1,500 for the calendar year, unless the withholding agent receives authorization for a waiver or a reduced withholding amount from the Franchise Tax Board. Payments of income that must be reported on a federal information return, such as form 1099-MISC, may be subject to California withholding at source if the recipient is a nonresident individual or a non-California business entity.

(2) California Source Income Subject to Withholding. The following types of California source income are examples of income subject to withholding on payments made to nonresidents:

(A) Payments made for services performed in California. The source of income from services is the location where the services are performed, and not where the nonresident lives, the location where the contract for services is entered into, or the place of payment.

(B) Payments received for a covenant not to compete in California.

(C) Payments releasing a contractual obligation to perform services in California.

(D) Income from options received as a result of performing personal services in California.

(E) Bonuses paid for services performed in California.

(F) Income from intangible personal property where the property has acquired a business situs in California.

(G) Rent or lease payments where the property is located in California.

(H) Royalty payments where the property is located in or has acquired a business situs in California.

(I) Prizes, awards, competitions, contests, game shows, or races performed in California.

(J) Distributions of California source income to nonresidents, including both cash and non-cash distributions.

(K) Gambling or gaming winnings won in California.

(L) Premiums, annuities, emoluments, compensation for services, partnership income or gains, and other fixed or determinable annual or periodical gains, profits, endorsement income, other types of income, and any other compensation representing California source income.

(M) Any other amount of California source income for which a state or federal information return is required to be filed.

(3) Business Situs. Income from intangible personal property such as stocks, bonds, notes, etc., is not income from California sources unless the property has acquired a business situs in California. A California business situs is acquired when the property is employed as capital in California. A California business situs is also acquired when the possession and control of the property has been localized in connection with a business, trade, or profession in California so that its substantial use and value attach to and become an asset of that business. The entire income, including the gain from the sale of such an asset, is income from California sources. Examples include an intangible asset pledged as security for a loan connected to a California business or a bank account maintained to pay expenses related to business activities in California. (For rules governing the determination of business situs, see Regulation section 17952.)

(4) Payments to Nonresident Aliens or Foreign Entities. Payments of California source income made to nonresident aliens or foreign entities are subject to withholding.

(5) Payments Made to Reimburse Expenses. If the reimbursement is separately accounted for and is not subject to federal information return (Form 1099 or Form 1042) reporting, withholding is not required on payments to reimburse nonresidents for expenses relating to services performed in California. When the reimbursed expenses do not meet these requirements, withholding agents should withhold on the total payment.



(6) Services in Connection With the Sale of Goods. Withholding is required on the portion of the sale that relates to services provided in California. A Nonresident Income Allocation Worksheet may be used to distinguish the portion of payments made for goods from the portion for services.

(b) Payments to Independent Contractors. See California Unemployment Insurance Code sections 13000 et. seq., for the definition of "employee" subject to wage withholding. Individuals other than employees who perform personal services in California are independent contractors subject to withholding for purposes of this regulation. If the independent contractor is a resident and provides an exemption certificate, no withholding is required.

(c) Payments to Nonresident Subcontractors.

(1) Withholding Requirements. The withholding agent is required to withhold when making payments directly to nonresident subcontractors for services performed in California.

(2) Payments to California Residents. Withholding is not required on payments to general contractors who are California residents.

(3) General Contractor Obligations. General contractors must withhold on payments made to nonresident subcontractors for services performed in California.

(4) Multiple Contractors/Contractor-of-Record. When the withholding agent makes payments to more than one contractor, the withholding agent should provide each contractor with a Nonresident Income Allocation Worksheet and a Withholding Exemption Certificate to determine if withholding is required. If the withholding agent knows of only one contractor, then the withholding agent should use the information provided by the contractor-of-record. If the contractor is a resident and provides an exemption certificate, no withholding is required. If the contractor-of-record is a nonresident, withholding is required on the total payment.

(d) Rent or Lease Payments to Nonresidents.

(1) Rent or Lease Payments Made to Nonresidents. Withholding on rent or lease payments to nonresidents is required when all of the following criteria are met:

(A) The rented or leased property, either personal or real property, or a combination thereof, is located in California for all or part of the year.

(B) The payments are made in the course of a trade or a business. Except as provided in subsections (B)(1), (B)(2), or (B)(3), a person or business entity making rent or lease payments to a nonresident, as well as a property manager who collects rent or lease payments on behalf of a nonresident owner, is considered to be making payments in the course of a trade or business and is considered a withholding agent.

1. A tenant of residential property who directly makes rent payments to a nonresident property owner is not making a payment in the course of a trade or business and, thus, is not required to withhold on payments.

2. An employee of a nonresident property owner who collects rent payments on behalf of the nonresident property owner is not a withholding agent and thus is not required to withhold on payments.

3. An individual, whether or not a family member of the nonresident owner, who collects rent payments on behalf of the nonresident property owner, and who receives no compensation from the nonresident owner, is not considered to be acting "in the course of a trade or business." Thus, the individual is not required to withhold on payments to the nonresident property owner.

4. A property manager providing services to a nonresident property owner, including but not limited to renting, leasing, or collecting rent or lease payments on behalf of the nonresident owner, is considered the withholding agent for withholding purposes. Rent or lease payments derived from real property as well as personal property located in California are California source income payments and subject to California withholding requirements.

(C) The total payments of California source income to the nonresident owner exceed \$1,500 for the calendar year.

(2) Types of Rental or Leased Property Subject to Withholding. Withholding is required on income derived from renting or leasing real or personal property such as machinery equipment, vehicles, aircraft, land and buildings.

Example: A property management company collects rents from tenants for a nonresident California property owner. The property management company is required to withhold 7% of all payments associated with rents paid to nonresident owners when the payments are greater than \$1,500 per calendar year. The property management

company may deduct their management fees and then calculate the 7% withholding based on the amount to be sent to the property owner.

(e) Royalty Payments Made to Nonresidents.

(1) Compensation for the Right to Use Natural Resources. Withholding is required on royalty payments made to nonresidents for the right to use natural resources located in California, including, but not limited to, oil, gas, other minerals, geothermal, and timber.

(2) Compensation for Services Derived from Intangible Property Having a Taxable or Business Situs in California. Withholding is required on royalty payments made to nonresidents for services performed in California and for other compensation derived from a business or activity with a business situs in California. Royalty payments include compensation for such services derived from, but not limited to, patents, copyrights, secret processes and formulas, good will, trademarks, franchises, and other like property having a taxable or business situs in California. (For rules governing income from sources within California, see Regulation section 17951-2.)

(f) Payments to Corporate Directors.

(1) Withholding Not Required. Withholding is not required for wages, salaries, fees or other compensation paid by a corporation for services performed in California for that corporation to a nonresident corporate director for director services, including attendance at a board of directors' meeting. Each nonresident director must file a California income tax return reporting this California source income, unless he or she elect to be included in a group return under Revenue and Taxation Code section 18536.

(2) Filing of Information Return. An entity paying wages, salaries, fees or other compensation to a nonresident director must file an information return with the Franchise Tax Board and provide the payee with a payee statement. To meet this requirement, a payer who is required to file a federal information return (e.g. Form 1099-MISC) with the Internal Revenue Service must provide a copy of that same return to the payee.

(g) Seminar Speakers and Expert Witnesses. Withholding is required on payments that are compensation for services performed in California by a nonresident, including services performed as a seminar speaker or as an expert witness.

(h) Income Allocation.

(1) Nonresident Contractors. When nonresident contractors perform services within California as well as outside of California, reasonable methods may be used by the withholding agent to determine what portion of the services are provided within California. In addition to the two approved methods below, withholding agents may use other reasonable methods approved by the Franchise Tax Board.

Method 1: Allocation By Payer in Accordance with Contract: If by contract an athlete or entertainer is required to perform services in California on behalf of a sponsor, the payments received on the contract are considered to be personal services income subject to tax by where the services are performed, which is California. The payer may make a reasonable allocation of the California source income based on the contract and in accordance with the actual number of California performances, and should withhold California tax on the California payment.

For instance, where a contract requires an athlete to appear at a California tournament wearing the sponsor's clothing bearing its logo or using a sponsor's golf clubs, that athlete has performed a service on behalf of the sponsor in California, and the income is subject to California tax. If the contract requires appearances in California and other states, a portion of the endorsement income is California source income and subject to California income tax. The payer-sponsor should make a reasonable allocation of the payment based on the facts and circumstances of each contract, and withhold California tax on the California payment.

Method 2. Nonresident Income Allocation Worksheet: The withholding agent may request that the payee complete a Nonresident Income Allocation Worksheet to determine the amount of California source income subject to withholding. The withholding agent uses the information provided to determine what portion of the payment is subject to withholding.

For instance, a withholding agent sends a Nonresident Income Allocation Worksheet to an out-of-state independent contractor before making a payment for services. The total contract amount is \$100,000. The nonresident contractor returns a Nonresident Income Allocation Worksheet, certifying that \$60,000 is for services performed in California and \$40,000 is for services performed in another state. The amount of withholding would be:

\$60,000 California source income X 7% Withholding rate = \$ 4,200. Note: If the amount subject to withholding (\$60,000 in the example above) is equal to or less than \$1,500 for the calendar year, withholding is optional.

(2) Reliance on Allocations Provided by Payees. Withholding agents may generally rely on allocations provided by payees on a properly completed and signed Nonresident Income Allocation Worksheet. The withholding agent will be relieved of the withholding requirements if they rely in good faith on a completed and signed Nonresident Income Allocation Worksheet. If the withholding agent has actual knowledge that the Nonresident Income Allocation Worksheet is incorrect, they should not rely on it and should withhold at 7% on the entire payment. The withholding agent may not rely upon an incomplete, unsigned or fraudulent worksheet.

(3) Allocation Based on Time. Compensation for personal services performed by nonresident independent contractors will normally be allocated to California based on working days in California to total working days in and out of California ("duty days" for

professional athletes – see Regulation section 18662-6). The number of days covered by the contract can be used to determine the total working days in and out of California only when the payee is:

- (A) Hired for the exclusive use by the withholding agent for the entire contract period.
- (B) Required to be available to work each day at the discretion of the withholding agent during the contract period, and
- (C) Being paid whether or not providing services.

Days spent acquiring knowledge, skills, or necessary experience are not considered work days. Professionals and others who bill by the hour should allocate compensation based on the number of billable hours worked in California to the total number of billable hours related to the particular service.

(4) Reasonable Method of Allocation Based on Goods and Services. Withholding agents must use a reasonable method. One reasonable method is to use the same allocation of goods and services that is used for sales and use tax purposes in the sales contract. The portion of the payment not subject to sales or use tax would be considered payment for services and subject to withholding. If a payment is not subject to California sales or use tax, but is subject to another state's sales or use tax, withholding agents may also use the allocation for the other state to determine the portion relating to services and subject to withholding.

Generally, under California sales and use tax laws, charges for labor or services for installation are not subject to sales or use tax. Payments for installation would be subject to withholding. Charges for designing, consulting, performing feasibility studies, evaluating bids and providing training services are also considered service activities if they are separately stated and not part of the sale of tangible personal property. Payments for repairs would be subject to withholding, except for parts that are separately stated on the invoice. As payments for mandatory maintenance contracts or warranties are subject to sales tax, even if the cost of the maintenance contract or warranty is separately stated, the payments would not be subject to withholding. Payments for maintenance contracts or warranties not subject to sales tax are subject to withholding.

(5) Allocation of Distributions. Allocation of distributions between California and non-California source income based on past year's allocations for withholding purposes may be made by the trustee of a trust. If the trustee does not know the amount of California source income included in a distribution, the trustee may use the most recently filed year's ratio of California source income to total income to allocate the distribution.

Note: Authority cited: Section 19503, Revenue and Taxation Code.  
Reference cited: Section 18662, Revenue and Taxation Code.

Regulation section 18662-6 is amended to read:

§ 18662-6. ~~Withholding Agent~~Nonresident Withholding, Entertainers, Athletes and Speakers.

~~The term "withholding agent" means the person, including corporations, partnerships, fiduciaries and state officers, agencies or subdivisions, charged by the law or by the Franchise Tax Board's order or regulation with the duty to withhold any tax, interest or penalties from payments to the taxpayer and to pay such amounts over to the Franchise Tax Board.~~

~~Withholding agents will be required to reimburse the Franchise Tax Board for all taxes, penalties or interest which have been due from taxpayers and have not been withheld as required, unless the delinquent withholding agent can establish that such failure to withhold was due to reasonable cause, or unless the amounts which were not withheld as required shall have been paid to the Franchise Tax Board prior to the day on which such reimbursement is demanded by the Franchise Tax Board. See Reg. 18662-6 for provisions for collecting liability incurred by a withholding agent who has incurred such liability for failure to withhold amounts due from a taxpayer upon notice and demand.~~

(a) Payments Subject to Withholding.

(1) General. Payments to nonresident independent contractors for services performed in California by entertainers, athletes, and speakers are subject to withholding.

(A) The Phrase "Entertainers, Athletes, and Speakers." The phrase "entertainers, athletes, and speakers" (also referred to as "entertainers") includes, but is not limited to:

1. Actors
2. Bands
3. Boxers
4. Dance teams
5. Orchestras
6. Performers
7. Singers
8. Speakers
9. Sports entertainers and athletes
10. Wrestlers
11. Stage crews
12. Lighting crews
13. Promoters
14. Talent agents

(B) Withholding Required Even if Contract States No Withholding. Withholding agents are required to withhold tax on payments even when the nonresident

entertainer's contract states that there shall be no withholding from compensation. California law requires the withholding agent to withhold tax on payments, and the withholding agent is legally responsible for the withholding amount.

(C) Payments Made to Reimburse Expenses. If the reimbursement is separately accounted for and is not subject to federal Form 1099 information reporting, withholding agents are not required to withhold on payments to reimburse a nonresident entertainer for expenses relating to services performed in California. When the reimbursed expenses do not meet these requirements, the withholding agent should withhold on the total payment.

(2) Payments Made to Performer's Agents or Promoters. In general, withholding is required on California source income paid to the nonresident entertainer whether or not the Franchise Tax Board contacts the withholding agent. In addition, if the withholding agent receives notification from the Franchise Tax Board to withhold tax at source, withholding is required according to that notice on all payments made directly or indirectly to the nonresident entertainer. Withholding is required even if the performer's agent or promoter meets one of the exceptions listed in Regulation section 18662-4, subsection (c), because the exceptions apply to the entertainer as the person who directly performed the service. Since the entertainer performed the service, the entertainer is required to report his or her compensation for the performance and is entitled to the withholding credit in proportion to the performer's share of the income withheld upon by the entertainment venue.

Example: If compensation is earned by the entertainer but the entertainment venue pays the compensation directly to the performer's agent or promoter, the entertainment venue as the withholding agent must withhold and remit tax on the gross payments and provide the Franchise Tax Board with an information return which credits the withholding amount to the performer. The entertainment venue should not file an information return which credits the withholding amount to the performer's agent or promoter.

(3) Sound and Lights. Withholding is required on payment for sound and light services paid to a nonresident.

(b) Request for Waiver or Reduced Withholding Amount. Withholding is required on the total (gross) payment paid by the withholding agent, unless an exemption, waiver, or reduced withholding amount is authorized. Payees can request a waiver or reduced withholding amount by filing a written request (Nonresident Withholding Waiver Request or Nonresident Reduced Withholding Request) at least ten business days prior to the nonresident's performance or California activity date. The Franchise Tax Board will then determine, based on the information and documentation submitted, if withholding at the statutory 7% rate on the entire payment from the performance or activity will result in over-withholding. If so, the Franchise Tax Board may grant the waiver or authorize deductions from the gross amount to compute a withholding base that more accurately represents the nonresident entertainer's estimated tax liability when the 7% withholding rate is applied. If

the Franchise Tax Board grants a waiver or authorizes a reduced withholding amount, the Franchise Tax Board will then notify the withholding agent of the withholding required for the specific performance by sending the withholding agent a Waiver Determination Notice or Reduced Withholding Approval letter. If the withholding agent does not notify the Franchise Tax Board of the performance or the Franchise Tax Board does not notify the withholding agent of an approved waiver or reduced withholding rate, the withholding agent must withhold 7% from payments made to nonresident entertainers. (See Regulation section 18662-4.)

(c) Exceptions. Withholding is optional if the entertainer (not the entertainer's agent) meets one of the exclusions or exceptions listed in Regulation section 18662-4:

- (1) California Resident. The entertainer is a California resident.
- (2) California Business Entity. Payment is made to a business entity that is qualified to do business in California or has a permanent place of business in California for the entertainer's services.
- (3) Tax Exempt Organization. Payment is made to a tax exempt organization under either California or federal law for the entertainer's services.
- (4) Total Payments Equal to or Less Than \$1500. The total payments of California source income to the entertainer are equal to or less than \$1,500 for the calendar year.
- (5) Services Performed Outside of California. The services provided by the entertainer are performed outside of California.
- (6) Withholding Waiver Received. The entertainer or the withholding agent receives a withholding waiver from the Franchise Tax Board.

(d) Entertainment Venues Having Similar Names. An owner or lessor of a entertainment venue that receives a Reduced Withholding Approval letter or other correspondence from the Franchise Tax Board for a performance they are not engaged in must contact the Franchise Tax Board and provide the necessary information to allow the Franchise Tax Board to notify the correct withholding agent.

(e) Canceled Performances. If a withholding agent receives a Reduced Withholding Approval letter when no payment is made to the nonresident entertainer because the performance was canceled, the withholding agent should write "Canceled" on the Reduced Withholding Approval letter and return it to the Franchise Tax Board with an explanation that withholding was not done because the performance was canceled and no payment was made. The Franchise Tax Board may request additional information to validate the canceled performance.

(f) Additional Rules for Athletes.

- (1) Duty Days. A duty day is any day during which services are performed under the contract from the beginning of an official preseason activity until the last game played. The duty days in California are then divided by the total duty days to create a ratio, which is in turn multiplied by the total compensation. The result is California source income.



(2) Performance and Signing Bonuses. Performance bonuses should be included in the income to be allocated within and without California if any of the conditions to receive the bonus were met or partially met while performing services in California. The signing bonus issue is dealt with on a case-by-case basis with an examination of the wording of the contract. If services must be performed to receive or keep the signing bonuses and if any of those services are performed or partially performed in California, then the signing bonus should be included in the compensation to be allocated within and without California.

Note: Authority cited: Section 19503, Revenue and Taxation Code.  
Reference cited: Section 18662, Revenue and Taxation Code.

Regulation section 18662-8 is amended to read:

§ 18662-8. Time and Place for Filing Returns of Tax Withheld Reporting and Remitting Amounts Withheld, Penalties and Interest; Other Procedures.

~~If a Notice to Withhold has been issued for a particular engagement, tax withheld shall be remitted by the 20<sup>th</sup> day of the month following the month of the close of that engagement. In such cases, the original copy of the Notice to Withhold will serve as a Return of Tax Withheld at Source (Form 592) as well as the Statement of Tax Withheld at source (Form 591). Remittance shall then be made to the office of the Franchise Tax Board which issued the notice to Withhold at Source.~~

~~When a Notice to Withhold is not issued, a Return of Tax Withheld at Source (Form 592) is due on the 20<sup>th</sup> day of the month following the month in which the total amount withheld during the calendar year and not remitted exceeds \$2,500. Any amounts withheld and not previously remitted because the total did not exceed \$2,500 must be submitted by January 31 following the close of the calendar year. In all cases when a Notice to Withhold has not been issued, Returns of Tax Withheld at Source (Form 592) together with Copy A of the Statement of Tax Withheld at Source (Form 591) shall be remitted to the Franchise Tax Board, Sacramento, CA 95867.~~

(a) General. The Franchise Tax Board shall prescribe forms and instructions for the reporting and remitting of withholding of tax amounts.

(b) Real Estate Sales -- Information Returns.

(1) Payment Due Dates and Form. Real estate withholding is due by the 20<sup>th</sup> day of the calendar month following the month escrow closes. For example, if escrow closes on January 3, payment is due on or before February 20. If February 20 falls on a weekend or holiday, the payment may be remitted on the next business day without penalty. Payment of withholding on Section 1031 like-kind exchanges is due on the 20<sup>th</sup> day of the calendar month following the month in which the exchange was completed or failed. For simultaneous exchanges, the exchange is completed in the month escrow closes. For deferred exchanges, the exchange is completed in the month the last requirement of the exchange is completed. For failed exchanges, the exchange fails in the month when the proceeds were distributed to the seller after a determination that the exchange would not meet the Internal Revenue Code section 1031 exchange requirements. Remittance shall be in the form and manner as the Franchise Tax Board may prescribe in forms and instructions.

(2) Reporting.

(A) In General. Real estate withholding should be reported to the Franchise Tax Board either by paper form for paper payments (where allowable) or electronically along with the remittance, according to procedures announced by the Franchise Tax Board for information returns.

(B) Information Returns. An information return stating the amount of the real estate withholding shall be provided to the payee either at the time of sale or not

later than January 31st of the following calendar year, and may be required to be filed with the Franchise Tax Board, in the form and manner that the Franchise Tax Board may prescribe in forms and instructions. The payee may be required to attach a copy of the information return to the appropriate tax return to be filed with the Franchise Tax Board in order to claim a credit for the withheld amount.

(c) Withholding From Payments Other Than Real Estate Sales.

(1) Payment Due Dates. Withholding on payments is due under the same schedule as required for calendar year federal estimated tax. Withholding from payments made January 1 through March 31 is due April 15, April 1 through May 31 is due June 15, June 1 through August 31 is due September 15, and September 1 through December 31 is due January 15 of the following year. Remittance shall be in the form and manner as the Franchise Tax Board may prescribe in forms and instructions, either electronically or by paper check.

(2) Foreign (Non-U.S.) Partners – Due Dates. California follows federal procedures for foreign partners. Therefore, the due dates for payments are the same as the federal due dates, as prescribed in federal regulations, forms and instructions.

(3) Reporting.

(A) In General. Withholding on payments should be reported to the Franchise Tax Board either by paper form for paper payments (where allowable) or electronically along with the remittance according to procedures announced by the Franchise Tax Board for information returns. The name and Taxpayer Identification Number (TIN) of each payee should be provided so that the payment can be properly posted to the payee's account. The Franchise Tax Board may by forms and instructions prescribe how to report withholding where the payee fails to provide a TIN, or has applied for a TIN and has not yet received it at the time the withholding must be remitted.

(B) Information Returns. An information return shall be provided to the payee aggregating all withholding for the tax year by January 31st of the following year, and may be required to be filed with the Franchise Tax Board, in the form and manner that the Franchise Tax Board may prescribe in forms and instructions. The payee may be required to attach a copy of the information return to the appropriate tax return to be filed with the Franchise Tax Board in order to claim a credit for the withheld amount.

(4) Electronic and Magnetic Media Requirements. Payments and reports shall be made electronically as required by the Franchise Tax Board in forms and instructions. Any reference to forms or payments in these regulations shall be deemed to refer to corresponding electronic filings and payments where appropriate.

(5) Withholding Adjustments. If a withholding agent discovers that an amount was withheld in error, the withholding agent may file an amended information return showing the proper amount of withholding on the payment and either make an additional remittance or request a refund or credit of the erroneously withheld amount

to be refunded or credited either to the withholding agent or to the payee, as appropriate. If the withholding agent requests that the erroneously withheld amount be retained as a credit against the withholding agent's future withholding obligations (in cases where the withholding agent has repaid the erroneously withheld funds to the payee), the Franchise Tax Board will retain the withholding amount in the name of the withholding agent who can then apply the excess withholding on a later period remittance as a prior payment. The Franchise Tax Board shall supply forms and instructions for amended information returns and payments.

(d) Interest and Penalties.

(1) Interest. Revenue and Taxation Code section 18668, subdivision (b), allows the Franchise Tax Board to compute and assess interest on any amount not paid on or before the due date required by regulations, at the rate established pursuant to Revenue and Taxation Code section 19521, computed from the due date to the date paid. This interest is not a penalty, but compensation for the use of the funds from the date the withheld funds were due to the date remitted.

(2) Penalties and Liabilities.

(A) Information Return Penalties. Revenue and Taxation Code section 19183 incorporates federal information return penalties by reference. Withholding remittance statements and payee statements are information returns, and failure to file those returns may subject the withholding agent to information return penalties.

(B) Real Estate Information Return Penalties. A penalty may be assessed if the withholding agent fails to file a correct real estate information return between the due date and 30 days after the due date. The penalty increases if a correct real estate information return is filed more than 30 days following the due date, and again more than 6 months following the due date, or if a correct real estate information return is never filed.

If the noncompliance is due to an intentional disregard of the requirements, the penalty increases to the greater of \$100 or 10 percent of the required withholding. The penalty is for each real estate information return that the withholding agent does not file correctly by the due date.

(C) Liability of Withholding Agent for Unpaid Withholding. Revenue and Taxation Code section 18668, subdivision (a), provides that a withholding agent is liable for the amount that should have been withheld and applicable penalties and interest unless it is shown that the failure was due to reasonable cause.

Where the withholding agent pays the liability under subsection (d)(2)(C) for unpaid withholding and information return penalties plus interest, and if the nonresident payee subsequently files a return and pays the tax, the liability for unpaid withholding may be reversed upon written request by the withholding agent; however, the withholding agent remains liable for any information return penalties plus interest.

(D) Special Rules for Real Estate Withholding.

1. Real Estate Notification and Withholding Penalties. The penalty for not properly notifying buyers is the greater of \$500 or 10 percent of the required withholding. The penalty for failing to withhold is the greater of \$500 or 10 percent of the required withholding. If the failure to withhold is shown to be due to reasonable cause, the Franchise Tax Board will withdraw the penalty.

2. Real Estate Information Returns and False Exemption Certificates. The withholding agent may be subject to a \$50 penalty if the withholding agent does not provide the sellers with correct copies of real estate information returns by the due date. If the noncompliance is due to an intentional disregard of the requirements, the penalty increases to the greater of \$100 or 10 percent of the required withholding. The penalty is for each real estate information return that is not furnished. A real estate information return is considered correct when all applicable fields are completed, the information is correct, and the correct version of the form is used. The pre-printed year must match the year the transaction occurred. For sales, this is the year escrow closed. For installment payments, this is the year of the installment payment. For exchanges, this is the year the last requirement of the exchange was completed or when it was determined that the exchange would not meet the Internal Revenue Code section 1031 requirements and any cash or cash equivalent was distributed to the seller. If the seller knowingly executes a false exemption certificate, the seller may be subject to a penalty of the greater of \$1,000 or 20 percent of the required withholding.

(e) Separate Information Returns. The Franchise Tax Board may by forms and instructions prescribe when separate information returns and withholding statements must be provided to the payee and/or to the Franchise Tax Board, and when the withholding information may be provided on the information return.

(f) Coordination With Group Returns. Generally, withholding of tax is allowed as a credit against the tax shown on a group nonresident return.

Note: Authority cited: Section 19503, Revenue and Taxation Code.  
Reference cited: Section 18662, Revenue and Taxation Code.

Regulation section 25401(b) is renumbered and amended to read:

§ 25401(b)19002. Credit for Tax Withheld.

(a) The tax withheld under Article 5 (commencing with Section 18661) of the Revenue and Taxation Code or Section 13020 of the Unemployment Insurance CodeSection 26131 is allowable as a credit against the tax of the recipient of the income on a return for the taxable year with respect to the amount withheldimposed by the Bank and Corporation Tax Law. If the tax has actually been withheld at the sourceas required by Reg. 26131-2, credit or refund shall be made to the recipient of the income even though such tax has not been paid over to the Franchise Tax Board. For the purpose of the credit, the recipient of the income is the corporationtaxpayer who received amounts which were subject to withholdingas required by Reg. 26131-2, and included those income amounts on a return. Under Revenue and Taxation Code section 19307, no refund or credit of tax withheld or estimated tax paid can be allowed unless and until a taxpayer has filed a valid return for the year.

(b) Payments to Pass-Through Entities. Tax withheld from payments to pass-through entities must be passed through to the entity's owners (according to their ownership interest in the pass-through entity, except that owners of pass-through entities may authorize the pass-through entity to use some or all of the withholding credit to satisfy the entity-level tax of the pass-through entity due for the taxable year. No refund of tax withheld from payments to pass-through entities is allowed. Any credit passed through must be claimed by the entity's owners on their respective tax returns.

(c) Special Rule for Pass-Through Entity Year-End Distributions. Subject to the authorization of the owners of the pass-through entity, taxes withheld from payments made after the close of the taxable year can be applied as payments either to the previous taxable year or to the following taxable year to the extent those payments represent income required to be included in the return for that respective taxable year.

(d) Date of Credit.

(1) For purposes of computing the statute of limitations on refund claims, the date of all withholding payments is deemed to be the original due date for filing the income tax return.

(2) For purposes of computing the estimated tax penalty, the date the withholding is credited to the account is deemed to be the date withheld. For individuals, withholding is treated as paid on each applicable estimated tax payment due date, unless an individual taxpayer elects to treat all withholding of tax at source for the year as paid on the date withheld. (For further discussion of the date for the crediting of the estimated tax payments, see Internal Revenue Code section 6654, subsection (g).)

(3) For purposes of computing interest and penalties imposed under Revenue and Taxation Code section 18668, withholding payments are credited on the date such payments are remitted to the Franchise Tax Board.

(f) Federal Regulations Applicable. Regulations issued under the California Revenue and Taxation Code shall apply to the crediting of tax withheld, and, to the extent applicable, Internal Revenue Code sections 31 and 6513 and accompanying regulations.

Note: Authority cited: Section ~~26442~~19503, Revenue and Taxation Code.  
Reference: Section ~~25401b~~19002, Revenue and Taxation Code.